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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SHARPER IMAGE CORPORATION,
Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

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PETITION FOR WRIT OF CERTIORARI

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HSPP

QUESTIONS PRESENTED

Under the Due Process Clause of the Fourteenth Amendment, may a state deny any remedy to a taxpayer injured by an unconstitutional and discriminatory tax scheme on the grounds that

(a) state law provides that the invalidation of an unlawful and discriminatory exemption shall not affect taxes assessed against the injured taxpayer, or

(b) the injured taxpayer does not compete in the marketplace with the taxpayers who benefitted from the discriminatory tax exemptions?

RULE 29.6 LISTING

Sharper Image Corporation has no parent companies or nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Sharper Image Corporation hereby petitions for a writ of certiorari to review the judgment of the District Court of Appeal of Florida, First District, in this case.

OPINIONS BELOW

The order of the Supreme Court of Florida declining discretionary review is set forth in Appendix A. The opinion of the District Court of Appeal of Florida, First District, reported at 704 So. 2d 657 (Fla. Dist. Ct. App. 1997), is set forth in Appendix B. The judgment entered by the Circuit Court in and for Leon County, Florida, is set forth in Appendix C. The order of the Florida District Court of Appeal, denying certification to the Florida Supreme Court, is set forth in Appendix D.

JURISDICTION

The judgment of the District Court of Appeal of Florida, First District, was entered on December 8, 1997. Sharper Image's motion for certification to the Florida Supreme Court was denied by the District Court of Appeal of Florida, First District, on February 16, 1998. Discretionary review was denied by the Florida Supreme Court on September 14, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following statutes and constitutional provisions, the pertinent portions of which are set forth below:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

> No State shall enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

U.S. Const. amend. XIV, § 1.

> It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

* * * *

(b) At the rate of 6 percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state.

Fla. Stat. Ann. § 212.05(1) (West 1989).

(9) The taxes imposed by this chapter do not apply to the use, sale, or distribution of religious publications, bibles, hymn books, prayer books, vestments, altar paraphernalia, sacramental chalices, and like church service and ceremonial raiments and equipment.

Fla. Stat. Ann. § 212.06(9) (West 1989).

The sale at retail, the rental, the use, the consumption, the distribution, and the storage to be used or consumed in this state of the following are hereby specifically exempt from the tax imposed by part I of this chapter.

* * * *

(w) *Newspapers.*—Likewise exempt are newspapers.

Fla. Stat. Ann. § 212.08(7)(w) (West 1989).

(2) It is hereby declared to be the specific legislative intent to tax each and every sale, admission, use, storage, consumption, or rental levied and set forth in this chapter, except as to such sale, admission, use, storage, consumption, or rental as shall be specifically exempted therefrom by this chapter subject to the conditions appertaining to such exemption. It is further declared to be the specific legislative intent that should any exemption or attempted exemption from the tax or the operation or imposition of the tax or taxes be declared to be invalid, ineffective, inapplicable, unconstitutional, or void for any reason, such declaration shall not affect the tax or taxes imposed herein, but such sale, admission,

> use, storage, consumption, or rental, or any of them exempted or attempted to be exempted from the tax or taxes or the operation or the imposition of the tax or taxes, shall be subject to the tax or taxes and the operation and imposition thereof to the same extent as if such exemption or attempted exemption had never been included herein.

Fla. Stat. Ann. § 212.21(2) (West 1989).

STATEMENT OF THE CASE

This case presents two direct conflicts between the decisions of this Court and the decision of a Florida appellate court (which the Florida Supreme Court refused to review). The court below held that Sharper Image was not entitled to a remedy from a tax scheme whose special exemption for newspapers is admittedly unconstitutional (*Department of Revenue v. Magazine Publishers of Am., Inc.*, 604 So. 2d 459 (Fla. 1992)), and whose exemption for religious publications is unconstitutional under the decisions of this Court (*Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989)), as the First District Court of Appeal conceded. The Florida court denied Sharper Image any relief on the grounds that

(1) a Florida statute permits the state to collect and retain the discriminatory tax, even if the exemptions that create the discrimination are illegal, and

(2) Sharper Image was not competitively harmed by the unconstitutional deprivation because its catalogs did not compete directly in the marketplace with newspapers and religious publications, which are exempted from the use tax by statute.

Both of these holdings override the requirements of due process of law and squarely conflict with this Court's decisions. This is not the first time the Florida courts have disregarded this Court's precedents nor, given the state of Florida's law, will it be the last, unless certiorari is granted and the judgment below reversed. Florida's law challenged here is by no means unique. Other states

have similar tax laws. A decision here, therefore, will establish a uniform rule for controlling the assessment and collection of tens, perhaps hundreds, of millions of tax dollars.

A. Statement of Facts

Sharper Image is a Delaware corporation with its headquarters in San Francisco. The company sells its products through mailed catalogs as well as in its own retail stores, seven of them in Florida. Petitioner collected and remitted to the Department all Florida sales and use taxes due on sales at its Florida stores and on mail order sales to Florida residents. Petitioner challenges only the use taxes assessed on its monthly catalogs, which were printed and mailed from Nebraska by a contractor of Sharper Image's selection and which were delivered by the United States Postal Service.

The Department of Revenue assessed use taxes on the distribution of the catalogs in the amount of $212,170.22 for the audit period of April 1, 1987, through March 31, 1990. The tax was calculated at five percent (increased to six percent effective February 1, 1988) of the cost price of the catalogs. When the Department refused to abate the assessed taxes, Sharper Image sought a predeprivation remedy by filing suit in a Florida Circuit Court.[1] Sharper Image challenged the taxes assessed on the ground that the assessment violated the First Amendment, made applicable to the states by the Fourteenth Amendment's Due Process Clause, the Fourteenth Amend-

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[1] Sharper Image filed the lawsuit pursuant to Fla. Stat. ch. 72.011 (1)(a) (Supp. 1994), which allows a taxpayer to challenge the legality of a tax before payment. *See* App. 19a. Section 72.011 (3)(b)(1) generally requires the challenging party to deposit into the court the amount of the challenged assesment, plus penalties and accrued interest. That section does, however, allow the Department to waive the requirement that the amount of the challenged assessment be tendered into court. Sharper Image obtained such a waiver.

ment's Due Process Clause itself, and the Equal Protection Clause of the Fourteenth Amendment.[2]

Sharper Image's equal protection and due process claims rested on the undisputed unconstitutionality of Florida's use tax regime. In particular, Sharper Image contended that the exemptions for newspapers and religious publications rendered Florida's use tax regime unconstitutionally discriminatory. Sharper Image contended that the Department could either: (a) assess use taxes against those improperly exempted from the tax during the audit period, or (b) abate the use taxes assessed against Sharper Image for that same period.

B. Proceedings Below

The parties cross-moved for summary judgment in the Circuit Court. On August 27, 1996, the Circuit Court granted the Department's motion and denied Sharper Image's motion. Sharper Image then filed a timely appeal in the Florida District Court of Appeal, First District. That court affirmed the Circuit Court's decision.

The District Court of Appeal acknowledged that the Florida Supreme Court had struck down the newspaper exemption in *Department of Revenue v. Magazine Publishers of Am., Inc.*, 604 So. 2d 459 (Fla. 1992). The District Court of Appeal further acknowledged that the religious publications exemption is apparently unconstitutional under this Court's decision in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). The court found it unnecessary to declare the religious publications exemption unconstitutional, however, on the grounds that "Sharper Image [did] not suggest that its requested remedy would take a different form depending on which exemption is involved." *See* App. 11a.

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[2] Sharper Image also alleged that it had exercised no taxable privilege in Florida, that various aspects of Florida's tax scheme violated the Commerce Clause, and that other aspects of the assessment violated Florida law. These claims are not presented here.

Despite the conceded unconstitutionality of Florida's use tax regime as applied to publications, the District Court of Appeal rejected Sharper Image's equal protection and due process claims. *See* App. 11-15a. The District Court of Appeal looked to state law to provide the appropriate remedy for an unconstitutional exemption. *See* App. 13a. That Florida law states that, when a tax exemption is struck down, "such declaration shall not affect the tax or taxes imposed herein." Fla. Stat. Ann. § 212.21(2) (West 1989). In addition, the District Court of Appeal noted that, unlike in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the unlawful exemptions in this case did not give religious publications and newspapers a "competitive advantage" over Sharper Image. *See* App. 15a. Therefore, the District Court of Appeal held that, although the newspaper exemption was no longer valid, the tax imposed on Sharper Image during the audit period was a "legal tax that did not competitively disadvantage the taxpayer." App. 16a.[3]

Sharper Image sought review of the District Court of Appeal's decision in the Florida Supreme Court. The Department opposed Sharper Image's petition for review on the grounds that, *inter alia*, Sharper Image had not

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[3] The District Court of Appeal rejected the Department's contention that, despite the unconstitutionality of the exemptions, Sharper Image had no standing to challenge them. *See* App. 10a (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987) (holding that the publisher of a general interest magazine had standing to challenge tax exemptions for newspapers and religious publications), and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8 (1989) (holding that publisher of a nonreligious magazine could challenge a tax exemption for religious periodicals)). Because that court found standing and decided the federal questions asserted by Sharper Image, this Court has no occasion to revisit that finding. *See Coleman v. Miller*, 307 U.S. 433, 446 (1939) (holding that where the asserted interests are "treated by the state court as a basis for entertaining and deciding the federal questions," that "is sufficient to give the Court jurisdiction to review that decision").

"challenged the validity of the First District Court of Appeal's decision on the merits of the case," Respondent's Brief on Jurisdiction, Fla. S. Ct., at 3; that "the District Court did not find any discrimination between the use tax on the catalogs and either the newspaper or religious publication exemptions contained in the Florida Statutes," *id.* at 4; that Sharper Image had "not presented to this Court *any* argument in opposition to or in explanation of why the District Court's decision on the tax assessment is incorrect," *id.*; and that "[r]emedy was not an issue below," *id.* at 6. These were complete mischaracterizations of Sharper Image's petition.[4] On September 14, 1998, the Florida Supreme Court denied Sharper Image's petition for review. *See* App. 1a.

REASONS FOR GRANTING THE WRIT

This Court has long sought to ensure that states provide clear and certain remedies to taxpayers subjected to unlawful and discriminatory taxation. Here, even though Florida has assessed and will collect taxes from Sharper

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[4] First, Sharper Image's entire brief to the Florida Supreme Court "challenged the validity of the First District Court of Appeal's decision on the merits of the case." *See, e.g.*, Petitioner's Brief on Jurisdiction, Fla. S. Ct., at 3-10 (challenging the District Court of Appeal's holding that severance of discriminatory exemption was sufficient and that Sharper Image was not entitled to retroactive relief). Second, the District Court of Appeal clearly acknowledged that the newspaper exemption is unconstitutional discriminatory taxation, *see* App. 10a, and apparently assumed, without deciding, that the religious publications exemption is also unconstitutional, *see* App. 11a. Finally, the remedy required by the Due Process Clause was the very heart of Sharper Image's case. *See* Complaint ¶ 42 (alleging that Florida's severance of the unlawful exemption would "provide an insufficient remedy to the Plaintiff" and would "fail[] to provide meaningful backward looking relief"); Initial Brief of Sharper Image, Fla. Dist. Ct. App., at 9 (alleging that Florida had provided no "meaningful retrospective relief to cure" the unconstiutional discrimination); Petitioner's Brief on Jurisdiction, Fla. S. Ct., at 5 (challenging the District Court of Appeal's "failure to fashion any type of retroactive remedy").

Image under an admittedly unconstitutionally discriminatory tax scheme, Florida has denied Sharper Image any retroactive relief for taxes already assessed as well as any prospective relief from future discriminatory taxes. In so doing, the Florida courts flout past decisions of this Court requiring that victims of unconstitutionally discriminatory taxation be afforded a clear, certain, and meaningful remedy.

This case is an extreme but all-too-common example of states refusing to provide the remedies required by the Fourteenth Amendment.

1. Florida's rule renders inoperative this Court's efforts to ensure that victims of discriminatory taxation are given meaningful remedies. The Florida District Court of Appeal mischaracterizes *McKesson* as allowing a state to assess and collect unconstitutionally discriminatory taxes so long as a state statute authorizes that procedure. This is plainly wrong; state statutes may not override the requirements of the Fourteenth Amendment's Due Process Clause simply because the state prefers to keep the taxes already assessed and collected and to continue taxing unconstitutionally. This Court's decisions make clear that although remedies for discriminatory taxation are determined by state law, such remedies must meet minimum requirements of due process. Among those requirements is the obligation of a state to "create in hindsight a nondiscriminatory scheme," *McKesson*, 496 U.S. at 40, and to cease discriminating in the future.

2. The District Court of Appeal misinterprets *McKesson* and drastically narrows other decisions of this Court by ruling that a state must remedy unlawfully discriminatory taxation only where the injured taxpayer suffers a "competitive disadvantage." *Reich v. Collins*, 513 U.S. 106 (1994), *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), and *Texas Monthly*,

Inc. v. Bullock, 489 U.S. 1 (1989), are squarely to the contrary.

3. Absurd as Florida's position is, the decision below is not an isolated incident. Just last term, this Court ruled for taxpayers from whom Florida had collected taxes subsequently declared unlawful based on the same newspaper exemption at issue here. *See Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998) (reversing a decision by the Florida District Court of Appeal denying a post-deprivation remedy to taxpayers injured by the unconstitutional newspaper exemption). The Court also vacated a similar decision by the Florida Supreme Court for reconsideration in light of *Newsweek*. *See Dryden v. Madison County*, 696 So. 2d 728 (Fla. 1997), *vacated*, 118 S. Ct. 1162 (1998).

Indeed, it was the actions of the Florida Department of Revenue that gave rise to *McKesson*. In that case, the Court ruled for Florida taxpayers who sought a refund of excessive taxes paid pursuant to a tax scheme that violated the Commerce Clause. Although the Florida Supreme Court in that case acknowledged that the tax at issue violated the Commerce Clause, it nonetheless erroneously "declined to order any other form of relief for the taxes previously paid and timely challenged under the discriminatory scheme." 496 U.S. at 25.

In short, Florida's Department of Revenue and the Florida courts continue to disregard the requirements of the Due Process Clause with respect to remedying unlawful and discriminatory taxation. Moreover, Florida continues to exempt religious publications from its use tax, thereby continuing unlawful discrimination and ensuring future constitutional challenges to taxes assessed and/or collected by Florida under this regime. Certiorari should be granted to address a situation that is certain to recur.

Although perhaps the worst offender, Florida is not alone. Other state courts also allow states to evade their obligation to remedy discriminatory taxes. See *infra* pp.

16-18. In addition, at least thirteen other states have statutes similar to the one on which Florida relied in denying Sharper Image any remedy. *See infra* p. 18.

CERTIORARI SHOULD BE GRANTED TO PROTECT TAXPAYERS FROM UNCONSTITUTIONAL AND DISCRIMINATORY TAXATION

Despite this Court's repeated efforts to ensure that states relieve taxpayers of injuries caused by unlawful discriminatory taxation, the Florida courts denied Sharper Image a remedy on transparently fallacious reasoning. The District Court of Appeal held that, so long as a state statute required retention of an unlawfully collected tax, the state need not abate the tax here. Nor did the District Court of Appeal cure the discrimination because the religious publication exemption, although declared unconstitutional by the United States Supreme Court, had not yet been invalidated by the Florida Supreme Court. The District Court of Appeal also sought to distinguish controlling authority holding that taxpayers are entitled to relief from unconstitutionally discriminatory taxes even if they do not compete with the beneficiaries of the unconstitutional exemptions. None of these arguments provides a legitimate basis for what Florida has done and continues to do to petitioner.

As this Court's decisions in *Newsweek*, *Dryden*, and *McKesson* indicate, this Court has acted time and again to ensure that states comply with the requirements of due process. Unfortunately, this Court's intervention is necessary again to settle the matter once and for all.

A. Florida Denies Due Process of Law By Collecting, and Retaining, Taxes Imposed Upon Disfavored Taxpayers While Unconstitutional Exemptions Are In Effect.

The District Court of Appeal justified its refusal to provide a remedy on the grounds that a Florida statute provides that the unconstitutionality of a tax exemption "shall

not affect the taxes imposed." App. 14a. Specifically, Florida law provides:

> (2) It is hereby declared to be the specific legislative intent to tax each and every . . . use . . . set forth in this chapter . . . [and] should any exemption or attempted exemption from the tax . . . be invalid, ineffective, inapplicable, unconstitutional, or void for any reason, such declaration shall not affect the tax or taxes imposed herein, but such . . . use . . . exempted from the tax . . . shall be subject to the tax . . . to the same extent as if such exemption or attempted exemption had never been included herein.

Fla. Stat. Ann. § 212.21(2) (West 1989). Florida has not collected taxes from the exempted publications for the period for which it has assessed the use tax against petitioner.[5] Thus, the statute and the court's decision directly contradict this Court's long-established position that a person "who denies the legality of a tax should have a clear and certain remedy." *Atchison, T. & S.F. Ry. Co. v. O'Connor*, 223 U.S. 280, 285 (1912). For example, in *Ward v. Board of County Comm'rs*, 253 U.S. 17 (1920), the Court ordered Oklahoma to refund taxes collected from American Indians in violation of federal law, but which the state courts refused to remedy. This Court held that

> [t]o say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law.

Id. at 24; *see also Carpenter v. Shaw*, 280 U.S. 363, 369 (1930) (reversing refusal to provide a remedy for unlaw-

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[5] Indeed, Florida concedes that it has not identified, and cannot identify, the taxpayers who took advantage of the newspaper and religious publication exemptions during the audit period. *See* Initial Brief of Sharper Image, Fla. Dist. Ct. App., at 18-19 (collecting record citations).

ful taxes collected from Native Americans in violation of federal law on the grounds "that a denial by a state court of a recovery of taxes exacted in violation of the laws or the Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment").

In *Montana Nat'l Bank v. Yellowstone County, Mont.*, 276 U.S. 499 (1928), the Court reversed a decision refusing to remedy unlawful taxes levied by Montana against the shareholders of certain banks. Montana declined to provide a remedy on the grounds that the taxes were no longer being assessed in an unlawful manner. This Court held that, notwithstanding the state's repudiation of the unlawful tax scheme, the state was required to "cure the mischief which had been done." *See id.* at 504.

Similarly, *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931), required Iowa to provide a remedy to out-of-state banks that had been subjected to unlawfully discriminatory taxes. The Iowa Supreme Court acknowledged the discrimination, but held that the only remedy the petitioners were entitled to was "to await action by the taxing authorities to collect the taxes remaining due from their competitors or to initiate proceedings themselves to compel such collection." *Id.* at 243-44. This Court disagreed: "The right invoked is that to equal treatment," the Court stated, "and such treatment will be attained if either their competitors' taxes are increased or their own reduced." *Id.* at 247.

In *McKesson*, the Court reversed a Florida Supreme Court decision refusing to remedy a Florida tax on out-of-state crops that violated the Commerce Clause. *See* 496 U.S. at 24-25. Although the Florida Supreme Court struck down the tax and enjoined the state from preferring in-state goods in the future, it refused to provide the petitioner with a refund of taxes it had already paid. This Court held that

> [b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause. The State may choose to provide a form of 'predeprivation process,' for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State.

Id. at 36-37 (footnotes omitted). In any event, the state is required to "provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 31.

McKesson gave the states some flexibility in crafting this remedy. *See id.* at 39-43, 51-52. The Court held that a state may cure discriminatory taxation by "refunding to petitioner the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received." *Id.* at 40. Alternatively, the state may "assess and collect back taxes from petitioner's competitors who benefitted from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme." *Id.*[6] Either way, the

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[6] Although the Court spoke in terms of competitors in *McKesson*, as discussed in Part B., *infra*, pp. 15-16, that challenge had been brought under the Commerce Clause by competitors of those who benefitted from the unconstitutional exemptions. Competition was relevant to show discrimination against interstate commerce. This Court's decisions in *Reich*, *Harper*, *Davis*, and *Texas Monthly* establish that remedies for unconstitutional taxation are not limited to those who compete with the beneficiaries of the unlawful exemption. *See Reich*, 513 U.S. at 108 (no showing of competitive disadvantage necessary in order to remedy discriminatory taxation based on intergovernmental tax immunity); *Harper*, 509 U.S. at 100-102 (same); *Davis*, 489 U.S. at 817-18 (same); *Texas Monthly*, 489 U.S. at 8 (no showing of competitive disadvantage necessary in order to remedy discriminatory taxation under Establishment Clause of the First Amendment).

purpose of the retroactive relief is to "bring about the nondiscrimination that prompt injunctive relief would have achieved." *Id.* at 43 (internal quotation marks omitted). Florida ignored *McKesson* by providing neither alternative.

Moreover, Florida continues to exempt religious publications from its use tax, thereby ensuring that the issues presented in this case will recur. Taxpayers who challenge this discriminatory taxation in the future will be confronted with the same statutory bar to due process faced by the petitioner here.

B. Florida Denies Due Process Of Law By Refusing Sharper Image a Remedy Because Sharper Image Does Not Compete In the Marketplace With Those Who Benefitted From the Unlawful Exemptions.

The District Court of Appeal also refused to provide Sharper Image a remedy on the grounds that Sharper Image catalogs do not compete with religious publications and newspapers. See App. 15a. This conclusion overlooks that the discrimination at issue here is banned by the First Amendment's prohibition of laws abridging the freedom of speech or respecting an establishment of religion. Competitive disadvantage is not a prerequisite to a remedy where a state has discriminated against a taxpayer because of the content of its publication, as is the case here.

The *McKesson* Court discussed competitive disadvantage because the challenge in that case was brought under the Commerce Clause by out-of-state competitors of the in-state firms that had benefitted from discriminatory tax exemptions. The exemptions were illegal only because their effect on competition produced discrimination against interstate commerce. The purpose of remedying the discriminatory taxation was to protect the injured taxpayer "from the comparative economic disadvantage proscribed by the Commerce Clause." *McKesson*, 496 U.S. at 20.

Outside the context of the Commerce Clause, the Court has not required a showing of competitive disadvantage in discriminatory tax cases. *See Reich*, 513 U.S. at 108 (no showing of competitive disadvantage necessary in order to remedy discriminatory taxation based on intergovernmental tax immunity); *Harper*, 509 U.S. at 100-102 (same); *Davis*, 489 U.S. at 817-18 (same); *Texas Monthly*, 489 U.S. at 8 (no showing of competitive disadvantage necessary in order to remedy discriminatory taxation under Establishment Clause of the First Amendment). As demonstrated by the District Court of Appeal's determination that Sharper Image has standing to challenge the discriminatory exemptions, *see* App. 10a, competitive disadvantage is completely irrelevant to the discrimination suffered by Sharper Image.[7]

C. Despite This Court's Decisions, Other States Continue to Deny Due Process of Law to Taxpayers Subjected to Unconstitutionally Discriminatory Taxation.

Unfortunately, the decision below is by no means an isolated incident. Florida, however, has been the most recalcitrant in providing a remedy to taxpayers subjected to an unconstitutionally discriminatory tax regime. Just last term, for example, in *Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998), the Court prevented Florida from using a "bait and switch" tactic—disallowing a postdeprivation remedy on the grounds that a predeprivation remedy had been available—to retain sales taxes collected during the time the unlawful newspaper exemption at issue in this case was still in effect.

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[7] The District Court of Appeal also erred in attempting to distinguish this case from the *McKesson* line of cases on the grounds that Sharper Image, unlike the taxpayer in *McKesson*, "challenges the exemptions, and not the tax itself." App. 15a. The taxpayer in *McKesson* challenged its tax because of the exemption. The same was true in *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994). Just as the taxpayers in *McKesson* and *Kuhnlein*, Sharper Image challenges the validity of the taxes assessed against it on the basis of the unlawful exemptions.

Last term this Court also vacated another decision of the Florida Supreme Court refusing to remedy discriminatory taxation. In *Dryden v. Madison County*, 696 So. 2d 728 (Fla. 1997), *vacated*, 118 S. Ct. 1162 (1998), a trial court awarded only a partial refund to the taxpayers who successfully challenged special assessments imposed by a county on their property. Reviewing the trial court's decision, the Florida Supreme Court held that, despite *McKesson*, in some circumstances a state need not refund the proceeds of an illegal tax: "[w]here an invalid tax scheme applies across the board . . . 'equitable considerations' may preclude a refund." *Id.* at 730. The court found such equitable considerations in the fact that the taxes were used to provide benefits to all property owners, including garbage collection and disposal, landfill closure, ambulance services, and fire protection. *See id.* In addition, the Florida court noted that the county had "acted in good faith in imposing these assessments." *Id.* This Court vacated the Florida Supreme Court's decision in *Dryden* last term for further consideration in light of *Newsweek*.[8]

Although Florida is probably the most obstinate in refusing to afford taxpayers a remedy for discriminatory taxation, Florida is not alone. For example, in *Thayer v. South Carolina Tax Comm'n*, 413 S.E.2d 810 (S.C. 1992), the South Carolina Supreme Court held that a taxpayer who had successfully challenged an unconstitutional exemption was entitled only to severance of the unlawful exemption. *See id.* at 815. The court held that *McKesson* is applicable "only when taxpayers involuntarily pay a tax that is unconstitutional under *existing* precedents. *McKesson* is inapplicable when, as here, taxpayers have been subjected to a constitutional tax." *Id.* (emphasis added). The tax was "constitutional," accord-

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[8] The Florida Supreme Court has not yet issued its decision on remand.

ing to the South Carolina court, only because its clear unconstitutionality had not been recognized when it was collected.

More recently, in *H.J. Wilson Co. v. State Tax Comm'n*, No. 97-CA-00121-SCT, 1998 WL 427261 (Miss. July 30, 1998), the Mississippi Supreme Court, despite striking down a tax exemption as unconstitutional, refused to award a refund to a retail company that distributed product catalogs in the state on the grounds that the tax itself, apart from the exemption, was a "constitutional tax." *Id.* at *20.

Aside from these reported state court decisions, at least thirteen states, including South Carolina and Mississippi, have enacted statutes similar to Florida's. *See* Cal. Gov't Code § 55821 (West 1997); Del. Code Ann. tit. 5, § 1110 (1997); 35 Ill. Comp. Stat. Ann. 105/18-18 (West 1996); Kansas Stat. Ann. § 79-2011 (1997); Minn. Stat. Ann. § 168.76 (West 1986); Miss. Code Ann. § 27-10-23 (Supp. 1998); N.J. Stat. Ann. § 54:32B-29 (West 1986); N.Y. Real Prop. Tax Law § 1172 (McKinney 1989); R.I. Gen. Laws § 44-7-21 (1997); S.C. Code Ann. § 4-12-50 (Law Co-op. 1997); S.D. Codified Laws § 10-52-6 (Michie 1998); Wash. Rev. Code Ann. § 82.18.900 (West 1997); W. Va. Code § 11-21-94 (1998). Certiorari is therefore warranted to ensure that these state laws comport with due process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 11, 1998

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APPENDICES

APPENDIX A

SUPREME COURT OF FLORIDA

Monday, September 14, 1998

Case No. 92,604

District Court of Appeal
1st District—No. 96-3734

SHARPER IMAGE CORPORATION,
Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE,
Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petiton for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

HARDING, C.J. and OVERTON, ANSTEAD and PARIENTE, JJ., concur.

WELLS, J., dissent.

A True Copy

TEST

/s/ Sid J. White
SID J. WHITE
Clerk, Supreme Court

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. 96-3734

SHARPER IMAGE CORPORATION,
Appellant,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Appellee.

Opinion filed December 8, 1997.

An appeal from the Circuit Court of Leon County, William Gary, Judge.

KAHN, J.

This case involves a tax assessment against appellant, Sharper Image Corporation (Sharper Image), by the Department of Revenue (Department). In 1994, Sharper Image filed suit in circuit court, challenging the Department's assessment of use tax on catalogs published by Sharper Image outside of Florida and sent by Sharper Image's printer directly to Florida residents during the audit period of April 1, 1987, through March 31, 1990. Sharper Image and the Department filed cross-motions for summary judgment. The circuit court granted the Department's motion and denied Sharper Image's motion, entering final summary judgment in the Department's favor. Sharper Image has appealed and raises essentially two points: (1) Sharper Image exercised no taxable privilege with respect to the catalogs in Florida as required by the Florida statute, and (2) the assesment of use taxes on

Sharper Image catalogs violates the First Amendment and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution because the newspaper exemption of section 212.08(7)(w), as applied by the Department, violates the First Amendment, and the religious publication exemption of section 212.06(9) violates the First Amendment.[1] Sharper Image seeks abatement of use taxes assessed against it. We hold that the Department properly assessed a use tax, and that, irrespective of the illegality of the exemptions, Sharper Image is not entitled to the remedy it seeks.

In this case, no dispute exists regarding the facts. Sharper Image is a Delaware corporation headquartered in San Francisco. The company makes retail sales of merchandise through both mail and telephone order, and in store sales. During the audit period, Sharper Image maintained seven retail stores in Florida. It collected and remitted to the Department all Florida sales and use taxes due on sales at the Florida stores and on mail order sales to Florida residents.

The challenged use taxes were assessed on Sharper Image's monthly catalog. The catalog was printed and mailed from Nebraska by a contractor selected by Sharper Image. The catalogs were delivered by the United States Postal Service to residents of Florida and other states. Sharper Image stipulated that it intentionally, purposefully, and with the object to increase sales in Florida, distributed or caused to be distributed, the catalogs.

I. Exercise of a Taxable Privilege

First, appellant asserts that Sharper Image exercised no taxable privilege in Florida with respect to the catalogs. According to appellant, the circuit court ignored the re-

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[1] The parties filed a stipulation indicating that Service Merchandise Company (Service Merchandise) could file a brief as amicus curiae in support of appellant Sharper Image, and this court has approved that stipulation.

quirement under Florida law that a use or distribution of tangible personal property must occur "in this state" to properly trigger the use tax. Further, in arguing that no taxable event has occurred in this case, amicus Service Merchandise asserts that language in section 212.06(1)(a)[2] and section 212.06(6)[3] "make[s] plain the Legislature's design only to tax transactions or activities which occur after the arrival of the property in Florida and its repose here as part of the mass of property." Neither contention will withstand scrutiny.

> Section 212.05(1)(b), Florida Statutes (1987), provides: [A] tax is levied on each taxable transaction or incident, which tax is due and payable as follows: . . .
>
> (b) At the rate of 5 percent of the cost price of each item or article of tangible personal property when the same is not sold but used, consumed, *distributed,* or stored for use or consumption *in this state.*

(emphasis added).[4] Further, section 212.06(1)(a), Florida Statutes (1987), provides:

> The aforesaid tax at the rate of 5 percent of the retail sales price as of the moment of sale, 5 percent of the cost price as of the moment of purchase, or *5 percent of the cost price as of the moment of commingling with the general mass of property in this*

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[2] Section 212.06(1)(a), Florida Statutes (1987), is quoted *infra.*

[3] Section 212.06(6), Florida Statutes (1987), provides:

> It is however, the intention of this chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state of tangible personal property after it has come to rest in this state and has become a part of the mass property of this state.

[4] The tax rate in section 212.05(1)(b) was increased to 6 percent effective February 1, 1988. Ch. 87-548, § 8, at 39-40, Laws of Fla.

> *state*, as the case may be, shall be collectible from all dealers as herein defined on the sale at retail, the use, the consumption, the *distribution*, and the storage for use or consumption *in this state* of tangible personal property or services taxable under this part.
> . . .

(emphasis added).[5] In our view, the collective import of these statutes is that if tangible personal property is *distributed in Florida*, it is subject to a use tax. Because Sharper Image distributed tangible personal property, i.e., its catalogs, in Florida, it exercised a taxable privilege in this state and must pay a use tax. The "mass of property" and "moment of commingling" language in sections 212.06 (1)(a) and 212.06(6) refers only to valuation of property taxed under the statute and does not impose an additional prerequisite to taxation itself.

Sharper Image also asserts that "for the mailing of promotional materials from outside Florida directly to Florida residents to be a taxable event, a company must engage in activities regarding the production, printing, or mailing of the promotional materials *in Florida*" and "[t]hat simply did not occur here." The Connecticut Supreme Court has recently rejected a similar argument made by Sharper Image in contesting a use tax assessment on the distribution of its catalogs in that state: "Although Sharper Image neither stored, accepted or consumed the catalogs in this state, it did cause them to be distributed in Connecticut, which satisfies the broad taxable event of 'other use'. . . ." *Sharper Image Corp. v. Miller*, 692 A.2d 774, 779 (Conn. 1997). The Connecticut use tax statute, unlike the Florida statute, does not include the word "distribution." Nevertheless, the Connecticut Supreme Court determined that distribution fell within the plain language of "other use," a term included in the statute. *See also Service Merchandise Co. v. Arizona Dep't of Rev.*, 937 P.2d 336 (Ariz. Ct. App. 1996) (upholding use tax

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[5] The tax rate in section 212.06(1)(a) was increased to 6 percent effective February 1, 1988. Ch. 87-548, § 21, at 58-59, Laws of Fla.

assessment because distribution of catalogs and fliers in Arizona was use incidental to ownership even though "distribution" not specifically included in statute); *cf. Sharper Image Corp. v. Department of Treasury,* 550 N.W.2d 596 (Mich. Ct. App. 1996) (finding no use tax due where use tax statute did not specifically provide for taxation of distributions), *appeal denied,* 560 N.W.2d 636 (Mich. 1997).

In this case, not only does the Florida use tax statute specifically refer to distribution, but it also contains a definition of "use tax": "The term 'use tax' referred to in this chapter includes the use, the consumption, the distribution, and the storage as herein defined." § 212.02 (28), Fla. Stat. (1987). Further, the Florida statute defines "use":

> "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, or interest therein, except that it does not include the sale at retail of that property in the regular course of business. "Use" also means the consumption or enjoyment of the benefit of services.

§ 212.07(27), Fla. Stat. (1987). In addition, the definition section of the statute contains the following provision:

> The terms "retail sales," "sales at retail," *"use,"* "storage," and "consumption" include the sale, use, storage, or consumption of *all tangible advertising materials imported or caused to be imported into this state.* Tangible advertising material includes displays, display containers, brochures, *catalogs,* price lists, point-of-sale advertising, and technical manuals or any tangible personal property which does not accompany the product to the ultimate consumer.

§ 212.02(19)(b), Fla. Stat. (1987) (emphasis added). These statutes defining "use tax" and "use," particularly

section 212.02(19)(b), evidence the Legislature's intent to tax the distribution of catalogs in Florida, the activity at issue here.

Although Sharper Image made all of the arrangements concerning the mailing of the catalogs from its California headquarters, Sharper Image nevertheless supplied the addresses for the catalogs and directed that those catalogs be placed in the United States mail. *See Sharper Image Corp. v. Miller,* 678 A.2d 977, 980 (Conn. App. Ct. 1996) ("The plaintiff's control was the direction; relinquishing the right to withdraw or redirect does not for purposes of 'ownership' relinquish control. . . . By directing the shipping of the catalogs, Sharper Image retained ownership, even though it relinquished physical possession to the postal service."), *aff'd,* 692 A.2d 774 (Conn. 1997); *Talbots, Inc. v. Schwartzberg,* 928 P.2d 822 (Colo. App. Ct. 1996) (holding that distribution of catalogs to city addresses constituted use within city subject to taxation under municipal code provision). Sharper Image thus caused its catalogs to be distributed in Florida. Indeed, in the Connecticut case, Sharper Image may have conceded that its actions regarding the catalogs constituted "distribution" in that state. *See Miller,* 692 A.2d at 778 ("The crux of Sharper Image's argument is that, under the circumstances of this case, *the distribution of its catalogs in Connecticut* did not meet the definition of 'use' . . . ." (emphasis added)); *Miller,* 678 A.2d at 980 ("Sharper Image also argues that this statutory definition of 'use' cannot be judicially extended to include 'distribution.' "). Accordingly, in this case, the circuit court properly upheld the use tax assessment against Sharper Image because it distributed its catalogs in this state.

II. Constitutional Challenges to Exemptions

In the second point on appeal, appellant asserts that the assessment of use taxes on Sharper Image catalogs violates the First Amendment and the Due Process Clause of

the Fourteenth Amendment to the U.S. Constitution because the newspaper exemption of section 212.08(7)(w)[6] violates the First Amendment, and the religious publication exemption of section 212.06(9)[7] violates the First Amendment. Specifically, appellant argues that because the newspaper exemption and the religious publication exemption are unconstitutional, the use tax assessed against Sharper Image cannot be upheld. In response, appellee asserts that Sharper Image does not have standing to raise such an argument. To the point, appellee contends that Sharper Image is not in competition with newspapers or religious publications and, therefore, Sharper Image has not suffered any injury by having assessed against it a use tax on the distribution of its catalogs even though newspapers and religious publications are exempt from such tax.

In support of its contention that Sharper Image lacks standing, appellee relies on *Eastern Airlines, Inc. v. Department of Revenue*, 455 So. 2d 311 (Fla. 1984). In *Eastern Air Lines*, an airline that had been assessed a sales tax on aviation jet fuel attempted to challenge, as unconstitutional under the Commerce Clause, provisions granting fuel tax refunds to farmers and commercial fishermen. 455 So. 2d at 316. The Department asserted that the airline did not have standing to challenge these provisions because the airline was not in the fishing or farming business and the airline had not argued that farmers and/or fishermen are in direct or indirect competition with

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[6] Section 212.08(7)(w), Florida Statutes (Supp. 1988), provides:

(7) MISCELLANEOUS EXEMPTIONS.—

(w) *Newspapers.*—Likewise exempt are newspapers.

[7] Section 212.06(9), Florida Statutes (1987), provides:

The taxes imposed by this chapter do not apply to the use, sale, or distribution of religious publications, bibles, hymn books, prayer books, vestments, alter paraphernalia, sacramental chalices, and like church service and ceremonial raiments and equipment.

fishing or agriculture. *Id.* at 317. The Florida Supreme Court agreed that the airline did not have standing to raise the unconstitutionality of the refund provisions. *Id.; see State ex rel. Clarkson v. Philips,* 70 So. 367, 369 (Fla. 1915) ("One cannot raise an objection to the constitutionality of a part of a statute, unless his rights are in some way injuriously affected thereby, or unless the unconstitutional feature renders the entire act void or renders the portion complained of inoperative. . . . The constitutionality of a provision of a statute cannot be tested by a party whose rights or duties are not affected by it, unless the provision is of such a nature that it renders invalid a provision of the statute that does affect the party's right or duties."). The court explained that, even if it eliminated the refund provisions, the airline's rights would not be affected:

> We believe that the legislature's intent could still be accomplished if the full refund provisions relating to local commercial fishing and agriculture were to be eliminated and the remainder of the statute left intact. Therefore, we cannot say that these provisions, were we to declare them unconstitutional, are of such a nature that they would render invalid the portion of the statute that does affect Eastern's rights. Eastern has no standing to raise this issue.

Eastern Air Lines, 455 So. 2d at 317. Similarly, in this case, even assuming the exemptions cited by appellant are unconstitutional, this does not render invalid the portion of the statute affecting Sharper Image.

As appellant argues, however "[t]he demarcation between the favored and non-favored classifications of taxpayers in *Eastern,* i.e., between agricultural and fishing interests on the one hand, and airlines on the other, was not itself an unconstitutional distinction," whereas in this case the line separating taxable and nontaxable publications has been drawn based on unconstitutional criteria, i.e., the contents of those publications. Because appel-

lant's constitutional claim thus involves a content-based approach to taxation of publications, it does appear, contrary to appellee's assertion, that appellant has standing. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987) (holding that publisher of general interest magazine had standing to challenge constitutionality of sales tax scheme, which exempted sales of newspapers and religious journals, even though it did not publish such newspapers or religious journals). *See also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8 (1989) (finding that publisher of nonreligious periodical had standing to challenge sales tax exemption provided by Texas statute for religious periodicals even if state law remedy for unconstitutional exemption would be to eliminate exemption rather than extend it to nonreligious periodicals); *Department of Rev. v. Magazine Publishers of Am., Inc.*, 604 So. 2d 459, 462-63 (Fla. 1992) (Finding the imposition of a tax on the sales of magazines while exempting the sales of newspapers constituted an invalid tax scheme under First Amendment, the court explained that "the content of a publication is a key factor in determining whether the publication is subject to taxation" and the state had failed to show a compelling justification for the content-based taxation of publications.).

Regarding the merits of the second point on appeal, appellant argues that *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), and *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994), require the abatement of the use taxes assessed against Sharper Image because, under the Due Process Clause, the state must provide "meaningful backward-looking relief" when a taxing scheme is invalidated as discriminatory. Sharper Image correctly informs us that the Florida Supreme Court has declared the newspaper exemption in section 212.08(7)(w), Florida Statutes (Supp. 1988), unconstitutional. *See Department of Revenue v. Magazine Publishers of Am., Inc.*, 604 So. 2d 459 (Fla. 1992). In addition, in *Texas Monthly, Inc. v.*

Bullock, the United States Supreme Court held that a sales tax exemption for religious publications violated the First Amendment as made applicable to the states by the Fourteenth Amendment. 489 U.S. 1 (1989). The dissenting justices noted that, with the majority's decision, "the Court topples an exemption for religious publications of a sort that expressly appears in the laws of at least 15 of the 45 States that have sales and use taxes," including Florida. *Id.* at 30-31 n.2. Nevertheless, Florida's exemption for religious publications has not yet specifically been declared unconstitutional and, given that the Florida Supreme Court has already found the newspaper exemption unconstitutional, we do not find it necessary to engage in further analysis on this record regarding the possible unconstitutionality of the religious publication exemption. Indeed, Sharper Image does not suggest that its requested remedy would take a different form depending on which exemption is involved.

III. Remedy

A. Predeprivation Procedure

In *McKesson*, the United States Supreme Court explained that "[i]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a *postpayment* refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." 496 U.S. at 31 (footnote omitted; emphasis added). Nevertheless, in a footnote, the Court indicated that a *predeprivation* hearing would also satisfy due process concerns:

> We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under "duress" in the sense that the State has not provided a fair and

> meaningful predeprivation procedure. In contrast, if a State chooses not to secure payments under duress and instead offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, payments tendered may be deemed "voluntary." *The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause,* and taxpayers cannot complain if they fail to avail themselves of this procedure.

Id. at 39 n. 21 (citations omitted; emphasis added).

This court recently determined that the procedure, pursuant to section 72.011, whereby a taxpayer can contest a tax without penalty, by filing suit and paying the amount of the contested tax into the court registry, constituted a meaningful predeprivation remedy, consistent with due process, and made it unnecessary to provide meaningful backward-looking relief. *Newsweek, Inc. v. Department of Rev.*, 689 So. 2d 361 (Fla. 1st DCA 1997). In *Newsweek*, the taxpayer, relying on *McKesson*, sought a refund of taxes paid on the retail sale of magazines during the period, prior to the decision in *Magazine Publishers*, when newspaper were exempt. The court found *McKesson* inapplicable:

> [T]he coercive penalties which deprived the taxpayers in *McKesson* of any effective predeprivation remedy are not factors in this case. The taxpayers in *McKesson* were subject to onerous penalties if they did not pay the disputed tax before seeking a refund in a proceeding contesting the constitutionality of the tax. They had no predeprivation remedy because section 72.011 was not available to contest the liquor taxes at issue in that case; for that reason, *McKesson* is inapplicable.

Newsweek, 689 So. 2d at 364.

In this case, Sharper Image has availed itself of the predeprivation procedure under section 72.011. Therefore, the due process concerns in *McKesson*, which formed the basis of the Supreme Court's "meaningful backward-looking remedy" decree, are not present here. Indeed, appellant has cited us no cases suggesting that a *McKesson*-type remedy is available in circumstances such as this, where an adequate predeprivation procedure is available. Sharper Image essentially argues that an adequate predeprivation remedy must always be tantamount to a meaningful backward-looking remedy. These cannot be the same, however, because otherwise the *McKesson* decision would not have discussed the availability of adequate predeprivation procedures.

B. State Law Treatment of Unconstitutional Exemption

Federal constitutional requirements notwithstanding, the general rule for remedying an unconstitutional exemption looks to state law. *See Texas Monthly*, 489 U.S. at 8 ("It is not for us to decide whether the correct response as a matter of state law to a finding that a state tax exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the tax altogether."); *see also American Trucking Ass'ns v. Smith*, 496 U.S. 167, 176 (1990) ("When we have held state taxes unconstitutional in the past it has been our practice to abstain from deciding the remedial effects of such a holding. While the relief provided by the State must be in accord with federal constitutional requirements, we have entrusted state courts with the initial duty of determining appropriate relief." (citation to *McKesson* omitted)). The Florida tax statutes specifically indicate that even when an exemption is declared unconstitutional, such declaration shall not affect the taxes imposed:

> (2) It is hereby declared to be the specific legislative intent to tax each and every . . . use . . . set forth in this chapter . . . [and] should any exemption

> or attempted exemption from the tax . . . be invalid, ineffective, inapplicable, unconstitutional, or void for any reason, such declaration shall not affect the tax or taxes imposed herein, but such . . . use . . . exempted or attempted to be exempted from the tax . . . shall be subject to the tax . . . to the same extent as if such exemption or attempted exemption had never been included herein.
>
> (3) It is further declared to be the specific legislative intent to exempt from the tax . . . only such . . . uses . . . to the extent that such exemptions are in accordance with the provisions of the constitutions of the state and of the United States.

§ 212.21, Fla. Stat. In *Magazine Publishers,* after finding the newspaper exemption unconstitutional, the Florida Supreme Court turned to Florida law to determine the proper remedy and focused on section 212.21. 604 So. 2d at 463-64. According to the Florida Supreme Court, the statute "makes it clear that as between the imposition of the tax or the granting of an exemption, the tax shall prevail." *Magazine Publishers,* 604 So. 2d at 463; *see also Thayer v. South Carolina Tax Comm'n,* 413 S.E.2d 810, 815 (S.C. 1992) (holding that although exemption from use tax granted to religious publications violated First Amendment, exemption was severable from statute and thus taxpayer was still responsible for use tax on real estate advertising publication). Similarly, in this case, Florida law determines the proper remedy for the "unconstitutional taxing scheme" challenged by appellant, and that law indicates that the unconstitutional exemption, or exemptions, should be eliminated, not the assessed tax.

C. Dissimilarity to Refund Cases

We further find that Sharper Image's analogy to the taxation schemes in *McKesson* and *Kuhnlein* is imperfect. In *Kuhnlein,* the supreme court found the Florida impact

fee imposed on vehicles brought to this state after purchase elsewhere facially unconstitutional. 646 So. 2d at 725. For such a violation the "only clear and certain remedy is a full refund to all who have paid this illegal tax." *Id.* at 726. In this case, however, appellant challenges the exemptions, and not the tax itself. Nothing in *Kuhnlein* mandates a full refund remedy for a taxpayer such as Sharper Image.

The taxpayer in *McKesson* had to pay a tax on alcoholic beverages that, by virtue of favored treatment of certain Florida products, offended the Commerce Clause. This conclusion derives from the Florida Supreme Court's treatment of McKesson's claim: "[T]he tax scheme at issue places a clear discriminatory burden on interstate commerce. . . ." *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 524 So. 2d 1000, 1005 (Fla. 1988). McKesson found itself at a competitive disadvantage, because "[i]t [was] undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under this scheme are in direct competition with manufacturers and distributors of alcoholic beverages which do not." *Id.* at 1008. Such an observation simply cannot be made about the circumstances of Sharper Image versus the sellers of newspapers or religious publications. Although Sharper Image must pay the use tax, it can show no such disadvantage. Nothing in the record before us leads us to indulge a presumption that newspapers and religious publications have gained a competitive advantage over Sharper Image's catalog by virtue of the challenged exemptions.

IV. Conclusion

We hold that Sharper Image is subject to the use tax assessment because it distributed catalogs in this state. A *McKesson* remedy is out of place here because Sharper Image had an adequate predeprivation procedure in section 72.011, which it has pursued, and the tax involved

in this case is a legal tax that did not competitively disadvantage the taxpayer. Though Sharper Image has standing to challenge the "taxing scheme" as unconstitutional, it is not entitled to the relief it seeks.[8]

AFFIRMED.

ERVIN and BENTON, JJ. concur

---

[8] It cannot be said that Sharper Image has no real remedy despite its standing to challenge the "taxing scheme." The available remedy, striking the illegal exemption, should lead to a broader tax base and presumably more equitable rates. As this opinion notes above, the United States Supreme Court in *Texas Monthly* contemplated elimination of an exemption in response to a finding that such exemption is unconstitutional. 489 U.S. at 8.

APPENDIX C

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

Case No. 94-1849

SHARPER IMAGE CORPORATION,
a foreign corporation,
Plaintiff,

v.

THE DEPARTMENT OF REVENUE OF THE
STATE OF FLORIDA, a State Agency,
Defendant.

FINAL ORDER ENTERING SUMMARY JUDGMENT

THIS CAUSE came before the Court on the parties' cross-motions for summary judgment. The Court entered an order dated August 27, 1996, which granted the motion for summary judgment filed by Defendant, the Department of Revenue of the State of Florida; and denied the motion for summary judgment filed by Plaintiff, Sharper Image Corporation. For the reasons expressed in that August 27, 1996 order, which is incorporated herein by reference, it is hereby

ORDERED and ADJUDGED that final summary judgment is hereby entered in favor of the Defendant, the Department of Revenue of the State of Florida. The Plaintiff shall take nothing by this suit and shall go hence without day.

DONE and ORDERED in Chambers, at Tallahassee, Leon County, Florida, this 5th day of November, 1996.

/s/ William Dorsey
Circuit Judge

APPENDIX D

DISTRICT COURT OF APPEAL
FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

February 16, 1998

Case No: 96-03734

L.T. Case No. 94-1849

SHARPER IMAGE CORPORATION
Appellant,

v.

DEPARTMENT OF REVENUE
OF THE STATE OF FLORIDA
Appellee.

BY ORDER OF THE COURT:

Appellant's motion for certification, filed January 20, 1998, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

By: /s/ Jon S. Wheeler
JON S. WHEELER
Clerk

By: /s/ Rhonda Casseaux
Deputy Clerk

APPENDIX E

CHAPTER 72

TAX MATTERS

Fla. Stat. ch. 72.011 (Supp. 1994)

[1]72.011 Jurisdiction of circuit courts in specific tax matters; adminstrative hearings and appeals; time for commencing action; parties; deposits.—

(1)(a) A taxpayer may contest the legality of any assessment or denial of refund of tax, fee, surcharge, permit, interest, or penalty provided for under s. 125.0104, s. 125.0108, chapter 198, chapter 199, chapter 201, chapter 203, chapter 206, chapter 207, chapter 210, chapter 211, chapter 212, chapter 213, chapter 220, chapter 221, s. 336.021, s. 336.025, s. 336.026, s. 370.07(3), chapter 376, s. 403.717, s. 403.718, s. 403.7185, s. 403.7195, s. 403.7197, s. 538.09, s. 538.25, chapter 550, chapter 561, chapter 562, chapter 563, chapter 564, chapter 565, chapter 624, or s. 681.117 by filing an action in circuit court; or, alternatively, the taxpayer may file a petition under the applicable provisions of chapter 120. However, once an action has been initiated under s. 120.56, s. 120.565, s. 120.57, or s. 120.575, no action relating to the same subject matter may be filed by the taxpayer in circuit court, and judicial review shall be exclusively limited to appellate review pursuant to s. 120.68; and once an action has been initiated in circuit court, no action may be brought under chapter 120.

(b) A taxpayer may not file an action under paragraph (a) to contest an assessment or a denial of refund of any

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[1] Note.—Section 39, ch. 92-320, provides that:

"(1) The Department of Revenue may adopt emergency rules under section 213.06(2), Florida Statutes, to implement and administer the provisions of this act.

"(2) This section shall take effect upon this act becoming a law."

tax, fee, surcharge, permit, interest, or penalty relating to the statutes listed in paragraph (a) until the taxpayer complies with the applicable registration requirements contained in those statutes which apply to the tax for which the action is filed.

(2) No action may be brought to contest an assessment of any tax, interest, or penalty assessed under a section or chapter specified in subsection (1) after 60 days from the date the assessment becomes final. No action may be brought to contest a denial of refund of any tax, interest, or penalty paid under a section or chapter specified in subsection (1) after 60 days from the date the denial becomes final. The Department of Revenue or, with respect to assessments or refund denials under chapter 207, the Department of Highway Safety and Motor Vehicles or, with respect to assessments or refund denials under chapters 210, 550, 561, 562, 563, 564, and 565, the Department of Business and Professional Regulation, shall establish by rule when an assessment or refund denial becomes final for purposes of this section and a procedure by which a taxpayer shall be notified of the assessment or refund denial. It is not necessary for the applicable department to file or docket any assessment or refund denial with the agency clerk in order for such assessment or refund denial to become final for purposes of an action initiated pursuant to this chapter or chapter 120.

[2](3) In any action filed in circuit court contesting the legality of any tax, interest, or penalty assessed under a section or chapter specified in subsection (1), the plaintiff must:

(a) Pay to the applicable department the amount of the tax, penalty, and accrued interest assessed by such

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[2] Note.—Section 29(2), ch. 94-353, provides that "[i]t is the intent of the Legislature that the amendment to subsection (3) of section 72.011, Florida Statutes, as set forth in this section, be applied in all pending and future actions."

department which is not being contested by the taxpayer; and either

(b)1. Tender into the registry of the court with the complaint the amount of the contested assessment complained of, including penalties and accrued interest, unless this requirement is waived in writing by the executive director of the applicable department; or

2. File with the complaint a cash bond or a surety bond for the amount of the contested assessment endorsed by a surety company authorized to do business in this state, or by any other security arrangement as may be approved by the court, and conditioned upon payment in full of the judgment, including the taxes, costs, penalties, and interest, unless this requirement is waived in writing by the executive director of the applicable department.

Failure to pay the uncontested amount as required in paragraph (a) shall result in the dismissal of the action and imposition of an additional penalty in the amount of 25 percent of the tax assessed. Provided, however, that if, at any point in the action, it is determined or discovered that a plaintiff, due to a good faith de minimis error, failed to comply with any of the requirements of paragraph (a) or paragraph (b), the plaintiff shall be given a reasonable time within which to comply before the action is dismissed. For purposes of this subsection, there shall be a rebuttable presumption that if the error involves an amount equal to or less than 5 percent of the total assessment the error is de minimis and that if the error is more than 5 percent of the total assessment the error is not de minimis.

(4)(a) Except as provided in paragraph (b) of this subsection, an action initiated in circuit court pursuant to subsection (1) shall be filed in the Second Judicial Circuit Court in and for Leon County or in the circuit court in the county where the taxpayer resides or maintains its principal commercial domicile in this state.

(b) Venue in an action initiated in circuit court pursuant to subsection (1) by a taxpayer that is not a resident of this state or that does not maintain a commercial domicile in this state shall be in Leon County. Venue in an action contesting the legality of an assessment or refund denial arising under chapter 198 shall be in the circuit court having jurisdiction over the administration of the estate.

(5) The requirements of this section are jurisdictional.

(6) Any action brought under this chapter is not subject to the provisions of chapter 45 as amended by chapter 87-249, Laws of Florida, relating to offers of settlement.

Supreme Court, U.S.
FILED
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No. 98-957

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SHARPER IMAGE CORPORATION,
Petitioner,
v.
DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

BRIEF OF *AMICUS CURIAE* COMMITTEE ON STATE TAXATION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* COMMITTEE ON STATE TAXATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

This brief is submitted by the Committee On State Taxation as *amicus curiae* in support of the petitioner in the above captioned matter.[1] The Committee On State Taxation (COST) is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST, which was separately incorporated on January 1, 1992, has a

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members or counsel, has made a monetary contribution to the preparation or submission of this brief. Written consents of the petitioner and respondent have been obtained and filed with the Clerk of the Court.

membership of over 500 multi-state corporations engaged in interstate and international commerce. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities.

Many of COST's members are engaged in business in the State of Florida and thus have a particular interest in the remedial landscape in Florida, as well as other States. COST has filed *amicus curiae* briefs in two other cases before this Court concerning Florida's refusal to adhere to the Due Process Clause requirements related to unconstitutionally collected taxes. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), and *Newsweek, Inc. v. Department of Rev. of the State of Florida*, 522 U.S. 442 (1998). COST and its members are alarmed at Florida's persistent refusal to provide remedies that comport with the Due Process Clause. Further, the availability of remedies for unconstitutional taxes directly affects COST's members business activities in Florida by depriving them of constitutional rights enjoyed in other States. Therefore, COST has an interest in this case.

SUMMARY OF ARGUMENT

For at least the fourth time in ten years (and the third time in three years) this Court is asked to overturn a Florida court's decision to ignore Due Process demands relating to remedies for state taxes ultimately determined to be unconstitutional. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990); *Dryden v. Madison County*, 118 S. Ct. 1162 (1998); and *Newsweek, Inc. v. Department of Revenue*, 522 U.S. 442 (1998). As in the past, the State is attempting to avoid any consequences of imposing an unconstitutional tax by limiting its exposure to prospective only relief. Prospective only treatment directly contravenes several decisions by this Court, including *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) and *McKesson Corp. v. Division*

of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990). Nevertheless, the Florida court in this case concluded that *McKesson* is limited in several respects, including applying only to postdeprivation remedy cases and cases where discrimination is present. Neither view of *McKesson* has any merit. This Court has made clear that the Due Process Clause applies to both post and predeprivation remedies and, unlike the Commerce Clause, the Due Process Clause does not have a discrimination against interstate commerce component. Finally, the Florida court's attempt to hide behind a state law that strikes the offensive unconstitutional tax exemption rather than the tax is not an adequate basis for upholding the imposition of the unconstitutional tax on the Petitioner because state law cannot trump the Due Process Clause of the United States Constitution.

The Petitioner is entitled to a remedy that conforms to the Due Process Clause. The Court of Appeals' attempt to provide a prospective only remedy should be summarily reversed.

ARGUMENT

FLORIDA'S LATEST TACTIC TO RETAIN AN UNCONSTITUTIONALLY IMPOSED TAX IS NO DIFFERENT, AND SHOULD BE TREATED NO DIFFERENTLY, THAN ITS PRIOR ATTEMPTS TO LIMIT RELIEF TO A PROSPECTIVE ONLY BASIS.

This case presents no new or novel legal theory. Rather, this Court is asked once again to specifically direct Florida to comply with, and not flout, the Due Process Clause contained in the Fourteenth Amendment to the United States Constitution. U.S. Const. art. I, § 8, cl. 3. Florida, like several other States, has found itself in the predicament of deciding how to remedy an unconstitutionally imposed tax. Over seventy years ago this Court declared that States may not provide prospective only relief for unconstitutionally collected state taxes. *See, McKesson Corp. v. Division of Alcoholic Beverage and Tobacco,* 496 U.S. 18, 34-35 (1990) *citing Montana Nat'l Bank of Billings v.*

Yellowstone County, 276 U.S. 499, 504 (1928) ("prospective relief alone 'did not cure the mischief which had been done under the earlier [unconstitutional] construction.' "). Unfortunately, Florida has consistently ignored this Court's clear jurisprudence on the issue.

The Petitioner protested Florida's use tax on its distribution of catalogs within the State because the use tax violated the First Amendment to the United States Constitution.[2] The Petitioner availed itself of a statutorily authorized predeprivation procedure and timely protested the use tax prior to paying the State. The Florida Court of Appeals recognized that the tax scheme was unconstitutional, but nevertheless determined that the Petitioner was entitled only to prospective relief and remained liable for the tax for prior periods. *Sharper Image Corp. v. Department of Revenue*, 704 So. 2d 657, 662 (1997). Thus, Florida applied a "heads I win, tails you lose" approach and found that despite the unconstitutional nature of the tax, the Petitioner is still required to pay it.[3] The Florida Court of Appeals premised its decision on finding that: *McKesson* is inapplicable as it concerned a postdeprivation, not predeprivation, remedy; State law requires that the unconstitutional exemption, and not the tax, be eliminated; and, finally, that the Petitioner is not entitled to a "full refund remedy" because the tax does not create a competitive disadvantage. *Sharper Image*, 704 So. 2d at 663-664 (1997). Each of the Court of Appeals' justifications do not support a prospective only remedy and, therefore, the Court of Appeals should be summarily reversed.

In *McKesson*, the Florida Supreme Court found that a Florida tax unconstitutionally discriminated against inter-

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[2] *See, Department of Revenue v. Magazine Publishers of Am., Inc.*, 604 So. 2d 459 (Fla. 1992).

[3] "Irrespective of the illegality of the exemptions, [the Petitioner] is not entitled to the remedy it seeks." *Sharper Image Corp. v. Department of Revenue*, 704 So. 2d 657, 658 (1997).

state commerce but provided prospective only relief. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 524 So. 2d 1000 (1988). The court premised its denial of meaningful backward looking relief on its determination that the State relied in good faith on a presumptively valid statute and the taxpayer would receive a windfall if it received a refund of a tax likely passed on to customers. *Id.* at 1010. This Court framed the issue as "whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 31 (1990). In reversing the Florida Supreme Court, the *McKesson* Court held that the State must provide two elements: "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by *preventing any permanent unlawful deprivation of property.*" *Id.* at 36-37 (emphasis added).

In the present case, the Florida Court of Appeals distinguished *McKesson,* in part, because the "due process concerns in *McKesson,* which formed the basis of the Supreme Court's 'meaningful backward looking remedy' decree, are not present here." *Sharper Image,* 704 So. 2d at 662. In other words, the Court of Appeals determined that this Court's Due Process decisions concerning post-deprivation remedies do not apply to a case involving a predeprivation remedy. This distinction defies logic and this Court's decisions. "Under *McKesson,* [the State] has the flexibility to maintain an exclusively predeprivation remedial scheme, *so long as that scheme is 'clear and certain.'*" *Reich v. Collins,* 513 U.S. 106, 110-11 (1994) (emphasis added). Florida's insistence on enforcing its unconstitutional tax on the Petitioner, despite the Petitioner's success on the merits, does not amount to a "clear and certain" remedy as required by the Due Process Clause. In fact, it is no remedy at all.

This is not the first case in which a Florida court has accepted razor thin arguments in attempting to distinguish *McKesson* and enhance the State fisc. In *Dryden v. Madison County*, 696 So. 2d 728 (Fla. 1997), the Florida Supreme Court found that a governmental entity need not refund illegally collected taxes. The court distinguished *McKesson* because the "individual tax scheme applies across the board and confers a commensurate benefit." *Id.* at 730. The Florida court's spurious decision was not supported by this Court's jurisprudence and was devoid of any authority supporting its conclusion. This Court ultimately vacated and remanded the Florida court's decision. *Dryden v. Madison County*, 118 S. Ct. 1162 (1998).

The Florida Court of Appeals is of the mistaken view that while the State must refund an unconstitutional tax, the State may continue to collect an unconstitutional tax. In finding *McKesson* inapplicable to predeprivation remedies, the Court of Appeals relied on its earlier decision in *Newsweek, Inc. v. Department of Revenue*, 689 So. 2d 361 (Fla. 1st DCA 1997). *Sharper Image*, 704 So. 2d at 663. In *Newsweek*, the taxpayer sought a refund of the same unconstitutional tax imposed on publications at issue in the present case. In reversing, this Court noted that under *Reich v. Collins*, 513 U.S. 106 (1994), the State must not employ a "bait and switch" approach to the availability of remedies. *Newsweek, Inc. v. Department of Revenue*, 522 U.S. 442 (1998) (per curiam). This Court found that Newsweek could avail itself of a postdeprivation remedy despite the presence of a predeprivation remedy.

As in *Newsweek*, the challenged Florida tax has been found unconstitutional; nevertheless, the Florida Court of Appeals has determined that the Petitioner must still pay the unconstitutional tax. If Newsweek is entitled to recover the unconstitutional tax through a postdeprivation remedy, then the Petitioner must not be *forced* to pay it because it selected a predeprivation remedy. However, if

the Court does not agree to grant the petition for a writ of *certiorari*, that is exactly what will happen.

The Court of Appeals also erroneously rested its decision on a state law which requires that the exemption, and not the tax, be eliminated to remedy the unconstitutional taxing scheme. *Sharper Image*, 704 So. 2d at 663. While this remedy may cure the unconstitutional defect, it will do so on a prospective basis only—a result Florida has sought, and been denied, in the past. *See, McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 524 So. 2d 1000 (1988). This Court has expressly rejected a State's attempt to use a State law to override the Due Process Clause. In *Harper v. Virginia Dep't of Taxation*, Virginia's contention that State law provided a basis for providing prospective only relief of an unconstitutional tax violated the Supremacy Clause. 509 U.S. 86, 100 (1993). Absent intervention by this Court, Florida will elude the Due Process Clause requirements of a constitutional remedy and unlawfully deprive Petitioner of its property. Making matters worse, other States may be encouraged to follow Florida's lead in its incessant attempts to limit relief from an unconstitutional tax to a prospective basis.

Finally, the Florida court found that the Petitioner was required to pay the tax because the unconstitutional exemption did not create an economic disadvantage. *Sharper Image*, 704 So.2d at 664. The court, in another contrived attempt to distinguish *McKesson*, grafted a discrimination against interstate commerce requirement onto the Due Process Clause. While *McKesson* and other United States Supreme Court remedy decisions result from challenges to state taxes under the Commerce Clause, a Commerce Clause violation does not serve as a condition precedent to relief under the Due Process Clause. *See, e.g., Carpenter v. Shaw*, 280 U.S. 363 (1929). "A denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion

is itself in contravention of the Fourteenth Amendment." *Id.* at 369. The Due Process boundaries of proper state remedies apply equally to *all* unconstitutionally imposed state taxes, regardless of the portion of the United States Constitution that is violated. Thus, while economic discrimination may be relevant in determining whether it passes Commerce Clause muster, such an analysis has no bearing on the required remedy pursuant to the Due Process Clause.

CONCLUSION

The Florida Court of Appeals' decision to uphold the imposition of an unconstitutional tax violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The court's decision represents clear error and should be summarily reversed.

Respectfully submitted,

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QUESTION PRESENTED

Whether the State of Florida is required to provide a refund of use taxes, or other relief, to a distributor of advertising catalogs on the ground that newspapers and religious publications were not subject to the use tax.

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---

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Petitioner Sharper Image Corporation ("Sharper Image") sells merchandise in stores and through mail and telephone home orders. As part of its marketing operations, it distributes, through contractors, catalogs advertising its products. The catalogs contain descriptions of the various products offered for sale, as well as order forms and other information regarding purchase of the products.

The State of Florida imposed a use tax on the distribution of the Sharper Image catalogs within Florida for the

period between April 1, 1987 and March 31, 1990. In 1994 Sharper Image filed suit to challenge the tax, asserting several grounds for relief. Its primary argument, no longer relevant here, was that the tax was improperly levied under Florida law. In addition, Sharper Image argued that the State had unconstitutionally discriminated against its advertising material by exempting newspapers and religious publications from the tax.

The circuit court entered summary judgment for the Department of Revenue. *See* Pet. App. 17a. In its order, the court first held that taxation of the catalogs was proper under Florida law. It then went on to find that Sharper Image had raised no constitutional issues warranting relief. *See* August 26, 1996 Order at 3 ("there are no State o[r] Federal constitutional problems present in this case").

The district court of appeal affirmed. It agreed with the circuit court that Florida law did not bar imposition of the tax on Sharper Image. *See* Pet. App. 3a-7a. With respect to the constitutional claims, the court of appeal noted that "the Florida Supreme Court has declared the newspaper exemption in section 212.08(7)(w), Florida Statutes (Supp. 1988), unconstitutional," Pet. App. 10a (citing *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So.2d 459 (Fla. 1992)), and further observed that this Court had "held that a sales tax exemption for religious publications violated the First Amendment . . . ." Pet. App. 10a-11a (citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989)).[1] The court concluded, however, that Sharper Image was not entitled to the relief that it sought. *See* Pet. App. 3a, 11a-16a.

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[1] The court of appeal also said that "it does appear . . . that appellant has standing." Pet. App. 10a (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8 (1989); *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So.2d 459, 462-63 (Fla. 1992)).

The court of appeal rested its denial of relief on two principal grounds. First, the court determined that, under state law, the proper remedy for an unconstitutional exemption was to eliminate the exemption, not the tax. Pet. App. 13a-14a.[2] Second, the court pointed out that the exemptions at issue here, unlike the preferences at issue in the *McKesson* case, did not place the complaining taxpayer at a competitive disadvantage. *See* Pet. App. 15a ("[n]othing in the record before us leads us to indulge a presumption that newspapers and religious publications have gained a competitive advantage over Sharper Image's catalog by virtue of the challenged exemptions"). The court thus determined that Sharper Image was not entitled to relief. The Supreme Court of Florida subsequently declined review. *See* Pet. App. 1a.

ARGUMENT

The petition for certiorari should be denied. Although the Florida court of appeal took too narrow a view of the proper remedies for constitutional violations, the fact is that Sharper Image has no right to a remedy of any kind. To the extent that Sharper Image is seeking to invoke the claim of discrimination at issue in *Magazine Publishers*—that is, discrimination among distributors of *noncommercial* speech—it (as a distributor of *commercial* speech) is simply not within the category of taxpayers entitled to object to that discrimination. It thus lacks standing to pursue that claim. To the extent that Sharper Image is seeking to raise its own, quite different claim of discrimination—that is, discrimination between distributors of commercial and noncommercial speech—

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[2] Relying on its own opinion in *Newsweek, Inc. v. Department of Revenue*, 689 So.2d 361 (Fla. 1st DCA 1997)—a decision later vacated by this Court (118 S. Ct. 904 (1998))—the court of appeal distinguished the ruling in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), on the ground that Sharper Image had available to it, and in fact had invoked, an adequate predeprivation procedure for challenging the tax. Pet. App. 11a-13a.

its argument borders on the frivolous. Nothing in the First Amendment requires a State to subsidize commercial speech, either directly or indirectly through tax exemptions, merely because it subsidizes some forms of noncommercial speech. Indeed, any such proposition would run counter to a long history of subsidies making precisely that distinction.

Sharper Image fares no better in its challenge to the exemption for religious publications. Whatever may be the limitations on the right to exempt religious publications from a generally applicable tax, *see Texas Monthly v. Bullock, supra,* it is implausible to think that the Establishment Clause eliminates any and all distinctions between the treatment of religious speech and commercial advertising. Sharper Image is not a similarly-situated taxpayer, disfavored solely because its discussion of public issues does not focus on religion, but rather a taxpayer that does not discuss public issues of any sort. Again, therefore, either Sharper Image is not in the class of taxpayers entitled to complain about the exemption, or, if it is, then its claim is utterly meritless. One way or the other, it is not entitled to any relief.

This case, therefore, is of no general importance. Although the opinion below rested upon the wrong ground, the judgment below (denying relief to petitioner) is nonetheless correct. Furthermore, that portion of the opinion dealing with remedies for unconstitutional taxation is of limited practical effect. It represents nothing more than the analysis of an intermediate state court, and the State has now acknowledged that some of that analysis is in error, thus minimizing its significance for future cases. There is no reason for further review.

A. *Sharper Image Is Not Entitled To Relief*

1. We acknowledge that, insofar as the district court of appeal indicated that the State need not provide relief to a taxpayer establishing unconstitutional discrimina-

tion in a predeprivation challenge, its position is inconsistent with the principles set forth in *McKesson* and *Newsweek*. *See also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993); *Reich v. Collins*, 513 U.S. 106 (1994). Taken together, those decisions indicate that a State generally must provide an adequate remedy to taxpayers successfully challenging state taxes on federal constitutional grounds—so long, of course, as they meet all other legitimate requirements—regardless of whether the taxpayers pursue predeprivation or postdeprivation procedures.[3] Although the remedy need not be a refund of taxes paid (or a release from the obligation to pay them), *see McKesson*, 496 U.S. at 40 & n.23, it must be sufficient to address the particular nature of the constitutional violation for the period of taxation in question. *See id.* at 36-49. In its mistaken reliance on its earlier opinion in *Newsweek*—not yet vacated by this Court—the court of appeal did not fully recognize that obligation.

The court of appeal need never have reached the issue of remedy, however, for it is readily apparent that Sharper Image has no serious constitutional objection to the tax imposed on it. To begin with, there is no merit whatever to the claim that Florida cannot subsidize, through tax exemptions, certain types of noncommercial speech (*e.g.*, newspapers) without also subsidizing commercial speech (*e.g.*, the Sharper Image catalogs).[4] Although this Court

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[3] A State, however, may decline to provide a remedy to taxpayers that bypass an available predeprivation procedure, *McKesson*, 496 U.S. at 38 n.21, so long as it makes clear that taxpayers do not have the option of waiting and electing a postdeprivation procedure. *See Reich*, 513 U.S. at 110-11; *Newsweek*, 118 S. Ct. at 904-05. It may also deny relief to taxpayers that fail to comply with other legitimate state requirements. *See McKesson*, 496 U.S. at 45.

[4] The Department of Revenue, in its brief submitted to the court of appeal, specifically argued that "[t]he difference in the taxation of publications and advertising is legitimate and supportable." Br. at 29. It is thus entitled to defend the judgment below on that ground. *See Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

has indicated that the First Amendment imposes some restraints on governmental power to subsidize speech—whether directly through cash grants or indirectly by means of tax exemptions, *see Arkansas Writers' Project*, 481 U.S. at 227-33; *Leathers v. Medlock*, 499 U.S. 439, 447 (1991); *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2179 (1998)—it has never held, or even suggested, that the lawfulness of a subsidy for noncommercial speech turns on the existence of a comparable subsidy for commercial speech. To the contrary, to the extent that the Court has addressed concerns about discriminatory governmental subsidies, it has been discrimination *among* categories of noncommercial speech that raised the possibility of harm to the marketplace for speech. *See, e.g., Arkansas Writers' Project, supra; Leathers v. Medlock, supra.* That kind of discrimination has no application to Sharper Image, which limits its catalogs to the promotion of its products. *See* pages 7-8 *infra.*

It would be anomalous, in fact, to hold that the First Amendment requires equivalent subsidies for commercial and noncommercial speech. This Court has made clear that "differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." *Leathers*, 499 U.S. at 447. But, as the Court has frequently observed, the defining characteristic of commercial speech —*i.e.*, that it is speech aimed at encouraging a commercial transaction (*see Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980))—means that it is hardier by nature and less prone to governmental suppression. *See, e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 n.20 (1978) (commercial speech "is not as likely to be deterred as noncommercial speech . . . ."). It follows that commercial speech is also less in need of governmental encouragement, either in the form of supporting grants or exemption from taxation.

The notion that the First Amendment requires equal subsidies for commercial and noncommercial speech would also be contrary to longstanding, well-accepted practice. For example, the very distinction about which Sharper Image complains—the distinction between publications of general interest and advertising circulars—is embodied in regulations promulgated under the federal postal code. *See* 39 C.F.R. Ch. III (7-1-98 ed.) Pt. 3001 Subpt. C, App. A §§ 412.2, 412.4. Those regulations incorporate a special classification for "General Publication[s]," which are defined as publications "originated and published for the purpose of disseminating information of a public character, or devoted to literature, the sciences, art, or some special industry" (§ 412.2); the regulations expressly *deny* that classification to publications "designed primarily for advertising purposes" (§ 412.4). More generally, the Corporation for Public Broadcasting distributes federal funds to noncommercial television and radio stations on the express condition that recipients of its funding not carry advertisements. *See* 47 U.S.C. § 399(b)(2) ("[n]o public broadcast station may make its facilities available to any person for the broadcasting of any advertisement"). If the First Amendment required equal subsidies for commercial and noncommercial speech, not only would this condition be unlawful, but it would seem that Congress would actually have to disperse federal funds to support commercial advertising as well. There is no basis in First Amendment doctrine for that unlikely conclusion.

Perhaps aware that its own claim is meritless, Sharper Image has tried to tie itself to a different, more reasonable claim: that a State cannot subsidize certain noncommercial publications without subsidizing other noncommercial publications. *See Department of Revenue v. Magazine Publishers of America, Inc., supra.* But this type of discrimination—the basis for the successful challenge to the newspaper exemption in *Magazine Publishers*—is one of which Sharper Image cannot rightfully complain. Any discrimination *within* the class of noncommercial pub-

lishers is of no consequence to Sharper Image, which is not itself within the class. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992) (denying standing to party not "among [those] injured" by the challenged law) (internal quotation omitted). Sharper Image thus runs afoul of the general rule that a litigant must assert its own rights, not the rights of third parties. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (noting "general prohibition on a litigant's raising another person's legal rights"); *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

The Court has recognized some exceptions to the general rule, *see Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989), but Sharper Image does not fall within them. Most obviously, there is no impediment to First Amendment challenges brought by noncommercial publishers themselves: not only have such challenges been prosecuted, but it is the favorable outcome of an earlier suit brought by noncommercial magazine publishers that Sharper Image now seeks to capitalize on. Nor can Sharper Image rely on concerns about "overbreadth." Even if that doctrine applied to commercial speech—which it does not (*see Waters v. Churchill*, 511 U.S. 661, 670 (1994))—Sharper Image could not claim that its present suit is necessary to prevent a "chill" on the rights of other publications because it is seeking retroactive relief for years long past. Sharper Image thus cannot piggyback on the claims of noncommercial publishers, a class to which it does not belong.[5]

The end result is that Sharper Image has no serious grounds to challenge the newspaper exemption. Its own

[5] Sharper Image argues (Pet. 7 n.3) that this Court has "no occasion to revisit" the finding below that it has standing. This argument is incorrect. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 623 n.2 (1989); *Doremus v. Board of Education*, 342 U.S. 429 (1952). In any event, our point is not that Sharper Image lacks any standing but, rather, that it lacks standing to make certain claims.

claim is feeble at best, and its derivative claim (asserting the rights of noncommercial publishers) is beyond its power to bring. There is thus no basis on which to award relief.

2. The same problems affect its challenge to the exemption for certain religious items (including religious publications). While it may be the case that an exemption for religious publications, to be valid, must encompass other types of publications as well, *see Texas Monthly*, 489 U.S. at 14-17 (plurality opinion); *id.* at 28-29 (Blackmun, J., concurring in the judgment), it stretches the Establishment Clause beyond recognition to say that it requires parity between taxation of religious matter and taxation of advertising catalogs. A challenge brought by charitable or educational publications subject to the tax, or even by other noncommercial publications, may raise plausible claims of unconstitutional favoritism, but, again, Sharper Image is not within the relevant class. Unless it means to argue that *any* taxpayer subject to the use tax can challenge the exemption for religious materials, Sharper Image would seem to stand on no better footing than any other purveyor of goods or services seeking to escape the tax.

It is also difficult to see just what the merits of its Establishment Clause claim might be. This Court has made plain that the Establishment Clause does not bar exemptions for religious publications under any and all circumstances, but only when the exemption is insufficiently broad. *See Texas Monthly*, 489 U.S. at 14-15 (plurality opinion); *id.* at 28-29 (Blackmun, J., concurring in the judgment). Any violation of the Establishment Clause thus arises, not from the fact that an exemption is provided, but from the fact that it is denied to similarly-situated publications, which are treated as different only because of their lack of religious content. But the Sharper Image catalogs, far from being similarly-situated, are different for a wholly distinct reason: they do not discuss public issues (religious or not) at all. To

deny a tax exemption to a purely commercial publication raises no concerns that the Establishment Clause can be reasonably thought to address.

B. *The Case Is of No General Importance*

The decision below, while resting on an admittedly erroneous ground, is not of any general importance. Here, the judgment of the district court of appeal was patently correct: petitioner is not, in fact, entitled to any relief. Its constitutional arguments—based on exemptions to which, as a practical matter, it could have no real objection[6]—are simply not enough to demonstrate a colorable violation of its own First Amendment rights, and, had it lost on that basis below, those arguments would not support plenary review by this Court. The error, therefore, is effectively harmless.

The decision of the court of appeal also is of limited precedential significance. First of all, it is not a decision of the state Supreme Court, but only of an intermediate appellate court. Under Florida law, therefore, the decision is not even binding on other state district courts of appeal. *See Pardo v. State*, 596 So.2d 665, 667 (Fla. 1992). Furthermore, the State, having acknowledged error below, will not be able to assert the decision as controlling authority to deny relief in other suits by taxpayers making constitutional objections. *But see* page 5 and note 3 *supra*. Those taxpayers may well be entitled to the type of relief sought by Sharper Image here, provided that they are able to do what Sharper Image cannot do: demonstrate that they have been subject to unconstitutional discrimination. There is thus no reason for further review here.

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[6] In this respect, the court of appeal was quite right: Sharper Image is not affected in any meaningful way, competitively or otherwise, by the existence of the challenged exemptions. *Cf. McKesson*, 496 U.S. at 48 (noting that taxpayer was put "at a relative disadvantage in the marketplace vis-a-vis competitors distributing preferred local products").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SHARPER IMAGE CORPORATION,
Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

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BRIEF AMICUS CURIAE OF THE INSTITUTE FOR PROFESSIONALS IN TAXATION FILED IN SUPPORT OF SHARPER IMAGE CORPORATION'S PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF THE INSTITUTE FOR PROFESSIONALS IN TAXATION

The Institute for Professionals in Taxation (IPT),[1] is a not-for-profit corporation organized under the laws of the District of Columbia. IPT was incorporated in 1976. It has offices at One Capital City Plaza, 3350 Peachtree Road NE, Suite 280, Atlanta, Georgia 30326-1040. IPT was organized for the purposes of 1) promoting uniform

[1] Formerly the Institute of Property Taxation. The parties have consented to the filing of this brief and their letters have been filed with the Clerk of this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

and equitable administration of state and local taxes (excepting income taxes) and 2) minimizing costs of administration and compliance with such taxes. The two taxes with which its members are prinicipally concerned are sales and use taxes and property taxes. IPT's membership comprises more than 3,800 tax professionals, representing more than 1,400 businesses, large and small, from across the United States. The membership includes employees who have direct responsibility for sales and use tax compliance in the states in which their companies do business. Also included are attorneys, accountants, and other independent tax consultants who are regularly called upon to advise clients with respect to their sales and use tax rights and obligations.

IPT's purposes are pursued through various efforts. It acts as a national information exchange with respect to state and local tax issues. The organization disseminates new state legislative proposals and enactments, rules, forms, instructions and rulings from taxing authorities, and judicial decisions arising from state and local tax disputes, together with analyses of and commentaries on such authorities. Each year IPT conducts two week-long schools in sales and use taxation, as well as forums, symposia and conferences at which relevant tax issues are explored in depth. In 1999, for example, it is co-sponsoring an advanced sales tax seminar with the American Bar Association. IPT has created a professional certification program, designating as Certified Members of the Institute (CMIs) those members who have accrued the requisite state and local tax education and experience and demonstrated their proficiencies through rigorous written and oral examinations.

Its commitment to uniform and equitable tax administration also leads IPT into various initiatives involving government officers and their associations like the International Association of Assessing Officers and the Federation of Tax Administrators. IPT delegates participate in

various industry-government roundtables which address recurring and emerging state and local tax issues, such as the Multistate Tax Commission Sales and Use Tax Nexus Guideline talks and the National Tax Association's Communications and Electronic Commerce Tax Project. IPT also hosts numerous local luncheons for the purpose of bringing representatives of taxpayers and tax administrators together to discuss liability and administrative issues.

The decisions of this Court in state and local tax cases, the principles which they articulate and those which derive from those pronouncements, figure prominently into the business decisions of IPT members and IPT's educational efforts. As interpretations of national constitutional and congressional policies, they are central to IPT's promotion of uniformity and equity in the administration of tax laws. The Court's rulings are at the heart of the members' daily lives as tax professionals. The opinions dictate the states and local jurisdictions in which returns must be filed. They indicate which transactions may be included in the tax base. They interpret the limitations on the taxing powers of state and local governmental bodies. And in their enforcement of the guarantees against discriminatory and other unlawful taxation, the Court's rulings give some specificity to the states' duties to respond when their revenue measures cross the constitutional line.

While IPT rarely files amicus briefs, its decision to do so in this case reflects its belief that the issue here is one of enormous portent. The question is whether a state may enforce a tax assessment under an admittedly unlawful tax scheme, whether it may do so when the collection of such taxes works a discrimination indisputably forbidden by the United States Constitution. No matter could more compellingly implicate concerns with the equitable administration of state and local taxes than this. Moreover, the businesses from which IPT's membership is drawn, and the IPT tax professionals who advise them,

will find themselves in the position of trying to reconcile the decision below, holding that the taxpayer is not entitled to any remedy, with the *McKesson, Newsweek* and *Dryden* decisions [2] of this Court.

That task will confront them, in particular, as they endeavor to comply with their tax obligations, on the one hand, without forsaking their right to avoid taxes discriminatorily levied, on the other. Whether first to pay taxes believed to be unlawful and then to challenge them, or to withhold payment and challenge an ensuing enforcement action is a decision with which IPT members are confronted on a recurring basis—the Court's disposition of this case will clearly be of substantial import in making such decisions. Believing that this case will substantially affect the advice IPT tax professionals will be called upon to give, and the decisions which their businesses must make, IPT hopes through its participation as Amicus Curiae to present arguments useful to the Court's consideration of the questions presented.

REASONS FOR GRANTING THE WRIT

The decision below cannot be reconciled with this Court's decision earlier this term in *Newsweek, Inc. v. Florida Dep't of Revenue,* 118 S. Ct. 904 (1998). The decision below would yield the implausible result that the State of Florida would hereafter collect from the petitioner, Sharper Image Corporation, the very taxes which it has refunded to Newsweek—use taxes under a scheme which works admittedly unconstitutional results—despite the fact that Newsweek's claim and Sharper Image's include the same discrimination period (1988-1990).[3] Hav-

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[2] *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990), *Newsweek, Inc. v. Florida Dep't of Revenue,* 118 S. Ct. 904 (1998), and *Dryden v. Madison County,* 696 So. 2d 728 (Fla. 1997), *vacated* 118 S. Ct. 1162 (1998).

[3] Because Sharper Image's claims also stem from the exemption for religous publications, Fla. Stat. § 212.05(1) (1989), its request

ing been plainly instructed to mitigate the discrimination for the contested tax period in *Newsweek*, the Florida court refuses to do the same for Sharper Image. The Due Process Clause cannot be read to tolerate those two patently contradictory outcomes.

The refusal to mitigate the discrimination is all the more inexplicable when considered in this light: Sharper Image invoked below a predeprivation remedy under the very statute, Fla. Stat. § 72.011, upon which the same Florida First District Court of Appeal premised its denial of relief to Newsweek. The court held that Newsweek was not entitled to "meaningful backward-looking relief" under *McKesson* because it had available under that statute a predeprivation procedure. *Newsweek, Inc. v. Department of Revenue*, 689 So. 2d 361, 363 (Fla. Dist. Ct. App. 1997). Yet the same court has now held that Sharper Image's resort to that predeprivation procedure is likewise ineffective to gain it relief from discriminatory taxation for the contested tax period. In the wake of this Court's *Newsweek* decision, the lower court's stance suggests that Sharper Image should have followed the refund route, a variation on the "bait and switch" tactic which this Court condemned in *Reich v. Collins*, 513 U.S. 106 (1994) and *Newsweek*.

Newsweek sought and, with this Court's intervention, found relief from unconstitutionally discriminatory taxation for the period 1988-1990. Sharper Image has been denied relief for the same tax for that same period. The only essential difference is that relief for the petitioner here would take the form of an invalidation of the assessment, rather than a refund. Florida's refusal to give the Due Process Clause, U.S. Const. amend. XIV § 1, the same operation in both contexts is indefensible. While the dictates of that constitutional provision as explicated

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for relief pertains to the entire audit period, April 1, 1987 through March 31, 1990, not just the period during which the newspaper/magazine discriminaton was in place.

in the *McKesson* and *Newsweek* opinions seem abundantly clear, Florida appears intent on inventing procedural artifices as justification for denying relief from past discrimination. We find here the unfathomable rationale that Sharper Image's resort to a "predeprivation" procedure (assessment challenge) somehow relieves the State, under *McKesson*, from providing the very remedy (invalidation of the assessment) which that procedure contemplates.

If the states find an invitation to avoid Due Process requirements in the *McKesson* discussion of the states' "flexibility" in mitigating the effects of discriminatory tax schemes, it may be for this reason. The *McKesson* decision, and the long line of precedents from which it grew, arose in the context of postdeprivation, or refund, claims. The Court has not had occasion to say explicitly that the Due Process Clause imperative for mitigating past discrimination is as applicable when the constitutionally defective tax scheme is considered in a case in which the taxpayer has invoked a predeprivation remedy extended to it by state law. While one might think that such equality of treatment should be self-evident, the opinion below suggests otherwise. Certiorari should be granted for the purpose of making clear, in the context of a prepayment assessment challenge, the obligation of the states, whatever approach they choose within the "flexibility" accorded to them, to mitigate unlawful discrimination for the contested tax period.

I. FLORIDA DENIES SHARPER IMAGE ANY REMEDY IN VIOLATION OF *McKESSON* and *NEWSWEEK*

In the *Newsweek* case, the taxpayer sought relief from discriminatory taxation for the period 1988 through 1990. The First Amendment discrimination underlying its refund claim had been previously established.[4] Newsweek's

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[4] *Department of Revenue v. Magazine Publishers of Am., Inc.*, 604 So. 2d 459 (Fla. 1992). Newsweek was not put in a refund

request took the form of a request for a refund pursuant to Fla. Stat. § 215.26. When the Florida courts declined to afford Newsweek that relief, this Court vacated and remanded, pointing to the "long standing practice of permitting taxpayers to seek refunds" under that statute. *Newsweek,* 118 S. Ct. at 905. Rather than pay the tax and use the refund statute as Newsweek did, Sharper Image turned to another procedure for similar relief. Fla. Stat. § 72.011(1)(a) (1989) permitted taxpayers to "contest the legality of any assessment . . ." by filing an action in the State's circuit court.

In availing itself of that procedure, Sharper Image invoked a predeprivation remedy expressly granted to it by the State of Florida. The statute is there precisely for the purpose of allowing taxpayers to challenge the lawfulness of tax assessments; when a taxpayer is successful in establishing that an assessment is illegal, whether on constitutional or other grounds, the statute is the means by which it is invalidated. *See, e.g. Herre v. Florida Dep't of Revenue,* 617 So. 2d 390 (Fla. Dist. Ct. App. 1993), *aff'd* 634 So. 2d 618 (1994). It is not the purpose of actions under Section 72.011(1)(a), Florida Stat-

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posture by happenstance. The State's decision to insist on discriminatory taxes was calculated. In response to the *Magazine Publishers* decision, the Florida Department of Revenue promulgated a rule making newspapers taxable as of December 9, 1990, Fla. Admin. Code Rule 12A-1.008(1)(a) (1994), with the intended effect of leaving Newsweek, Sharper Image and others subject to discriminatory taxes prior to that date. *See discussion of rule at Newsweek, Inc. v. Dep't of Revenue,* 689 So. 2d 361, 362 (Fla. Dist. Ct. App. 1997). Having made a deliberate decision to leave the newspaper exemption in place until December 9, 1990, the State cannot now mitigate the discrimination by back-assessing newspapers. Even if it could somehow eschew its affirmative decision to leave the exemption intact during that period, it would be barred by the applicable statute of limitations from curing the discrimination by back-assessing the favored taxpayers. *See* Fla. Stat. § 95.091(3).

utes to secure general declaratory judgments[5] or other prospective relief. Rather an action challenging an assessment under that statute is concerned with the validity of the assessment, a claim by the State that tax is due for some prior period.

Florida did not deny Sharper Image's right to proceed under the assessment challenge statute. It did, however, refuse to accord the petitioner the only remedy which that statute contemplates in such circumstances.[6] And in the most curiously-twisted logic, it premised the denial of relief, under *McKesson*, upon the taxpayer's right to proceed with the very "predeprivation procedure," a Section 72.011(1)(a) assessment challenge, which Sharper Image was attempting to use. The court's reading of the Due Process Clause was effectively this: since Sharper Image had the privilege, under this statute, of challenging the assessment before paying it (predeprivation procedure), it was not entitled to have the unconstitutional discrimination effected by that assessment undone. The decision renders the Due Process Clause purely illusory in this context. The taxpayer's property may be taken under an admittedly discriminatory tax scheme and because the taxpayer may challenge the taking in advance, it will never be entitled under the Due Process Clause to avoid that discriminatory taking. The ruling prescribes a strangled reading of the Due Process Clause under which taxpayers may assert their constitutional rights with respect to the contested tax period, but will never be entitled to have them vindicated.

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[5] Another statute is available for that purpose. Fla. Stat. § 86.011 (1997).

[6] The court's suggestion that it was granting Sharper Image the remedy of striking the exemption for newspapers is disingenuous. *See* App. 16a, fn. 8. That "remedy" had been secured some five years earlier in *Magazine Publishers*, by another party in unrelated litigation. And though acknowledging the unconstitutionality of the exemption for religious publications, the court declined to reach this issue so that no consideration was given to the remedy which might flow from a ruling on this point.

The lower court's disposition is, if anything, more egregious than its refusal to approve a refund of taxes to Newsweek. Sharper Image has not paid the assessment. The monies are not in the State treasury. The State is not in the position of having its fiscal planning upset by the need to make unanticipated refunds.[7] To the contrary, the lower court's ruling would augment the State fisc with taxes discriminatorily laid. It would insist on the payment of taxes even though such enforced payment would work a discrimination the unconstitutionality of which is conceded. In *Catch-22* fashion, the ruling would enforce the collection of taxes which, if paid, would have been subject to refund pursuant to *Newsweek*.[8]

The discrimination would be further exacerbated by the imposition of interest accruing at an annual rate of twelve percent, Fla. Stat. § 212.12(3) (1989), and penalties of up to twenty-five percent, Fla. Stat. § 212.12(2)(a) (1989). The enforcement of those discriminatory taxes would be backed up by the Department of Revenue's power to revoke Sharper Image's right to do business in Florida, Fla. Stat. § 212.18(3) and to record liens against, seize and sell its property for the amounts due, Fla. Stat. § 212.15(4). In short, the State would insist on visiting that discrimination on Sharper Image in 1999

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[7] The State might not be heard to complain too vigorously on this point anyhow. After the states were invited to address this concern through various means, including enactment of a short statute of limitations period for such refund claims, in *McKesson* 496 U.S. at 45, Florida *lengthened* the period during which tax refunds could be claimed from three to five years. Fla. Stat. § 215.26(2) (1997).

[8] In fact, the State could continue to assess the discriminatory tax against other taxpayers like Newsweek for the period 1988-1990 if they failed to file a return, Fla. Stat. § 95.091(3)(a)1.d (1997). The State might then be assessing and collecting the same use tax from some taxpayers which it is simultaneously refunding to others, those for example who were late in paying such taxes and whose refund claims are still open under the five-years allowed by Fla. Stat. § 215.26(2).

despite the fact that the courts identified it and found it at odds with the assurances of the First Amendment to the United States Constitution in 1992. It is hard to imagine a plainer or more contemptuous departure from the long-standing mandate for a "clear and certain remedy" put forward in *Atchison, T & S. F. Ry. Co. v. O'Connor,* 223 U.S. 280, 285 (1912). Despite Florida's dubious role in the development of Due Process remedy rulings by this Court in the *McKesson, Newsweek* and *Dryden* cases, the State has denied any meaningful remedy to the petitioner.

II. *McKESSON* REQUIRES RELIEF FOR THE CONTESTED TAX PERIOD

That the lower court has misapplied *McKesson* is manifest. It has said that Sharper Image is not entitled to "meaningful backward-looking relief." *See* App. 12a. It has emphasized that *McKesson* addressed itself to the situation in which the taxpayer was relegated to post-payment action and found the ruling inapplicable on grounds that Sharper Image had the illusory "predeprivation procedure" described earlier in this brief. Yet the *McKesson* opinion, and the rulings on which it is based, stress the taxpayer's right to relief "for the contested tax period."

In reply to the state's argument that declaratory and injunctive relief prohibiting future discrimination satisfied the commands of the Due Process Clause, this Court responded that:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a States places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

See McKesson, 496 U.S. at 31. While it is true that the Court spoke of "meaningful backward-looking relief" in a statutory scenario which accorded the taxpayer no pre-deprivation procedure, it is equally clear that the Court found in the Due Process Clause the dictate for mitigating past discrimination. That is the meaning of the mandate to "rectify" the deprivation to which McKesson had already been subjected. The *McKesson* opinion found the taxpayer entitled not just to prospective relief, but "to a refund of the excess tax paid—at least unless the disparity is removed in some other manner." *See McKesson,* 496 U.S. at 35. There is no rational basis for reading the Due Process Clause as requiring the elimination of such prior "disparities" when the taxpayer seeks a refund, but as giving sanction to precisely the same disparate taking of a taxpayer's property when the taxpayer opts to challenge an assessment. In fact, the Court refers to the two types of actions as counterparts, describing a refund action as one in which taxpayers have made payment "prior to resolution of any dispute over the validity of the tax assessment." *See McKesson,* 496 U.S. at 37.

The *McKesson* opinion speaks of the need to " 'undo' the unlawful deprivation," 496 U.S. at 38, and of providing a refund in order to "erase the property deprivation." *Id.* It contemplates that the "clear and certain remedy" for an illegal tax scheme first referred to in *Atchison, T. & S. F. Ry. v. O'Connor,* 223 U.S. at 285, ensure that there be no "permanent unlawful deprivation of property." *See McKesson,* 496 U.S. at 40. That the *McKesson* ruling construes the Due Process Clause as requiring the mitigation of discriminatory taxation for the period which gave rise to the action cannot be doubted; the opinion refers to the need for relief "during the contested tax period" no less than eleven times. The Florida court's reading of *McKesson* substantially diminishes the guarantees afforded by the Due Process Clause, finding them inapplicable with respect to the contested tax period and overridden by a statute expressing the State's desire to

enforce even those assessments which are part of an unconstitutional scheme.

III. THE STATES WILL EXPLOIT OPPORTUNITIES TO AVOID DUE PROCESS REQUIREMENTS UNDER THE *McKESSON* LINE OF CASES

The *McKesson* opinion does not imply that the need to "create in hindsight a nondiscriminatory scheme" is avoided by the provision of a "predeprivation procedure." [9] Rather it contemplates that a "predeprivation procedure" will preclude discriminatory or otherwise unlawful taxes being exacted in the first place. The Court has never held that if taxpayers are given the advance opportunity of challenging the constitutionality of an assessment, they forfeit their right to be relieved of discriminatory taxation "during the contested tax period." The right to relief with respect to the contested tax period is explicit. It is not a function of the taxpayer's election as between a predeprivation and a postdeprivation procedure. The Court has not said that states may enforce assessments under a discriminatory tax scheme as long as they refrain from assessing for periods following the illegal scheme's exposure. Yet those are the readings of this Court's *McKesson* decision by the lower court here and the result which other states will impose, relying in part on statutes striking exemptions and retaining the levy provisions. *See* Pet. at 18.

If there is any room for such misconstruction by the states, it may stem from the pattern which the *McKesson* line exhibits—they are cases in which the taxpayer paid

[9] Between the *Newsweek* case and that of Sharper Image here, Florida's posture appears to be that whatever State-offered procedure a taxpayer employs, it is the wrong one; there is none, in the State's construct, which will afford relief for the contested tax period. Even if there were some third procedure (besides challenging an assessment or seeking a refund), Sharper Image could not now be denied relief for failing to use it. That is the "bait and switch" lesson in *Reich* and *Newsweek*.

the taxes in question, under duress, and sought relief in the form of a recovery of the contested amounts. The *Atchison* case, *supra,* was a claim for the recovery of capital stock taxes paid under duress. In *Ward v. Board Of County Commissioners,* 253 U.S. 17 (1920), a refund was sought of taxes coercively collected against Native American allotments. The decision in *Montana Nat'l Bank v. Yellowstone County, Montana,* 276 U.S. 499 (1928) addressed a claim for recovery of stock taxes paid under protest. In *Carpenter v. Shaw,* 280 U.S. 363 (1930), the Court was confronted with an action to recover royalty taxes paid by Choctaw Indians under compulsion. *Iowa-Des Moines Nat'l Bank v. Bennett,* 284 U.S. 239 (1931) concerned a demand for the refund of bank stock taxes paid under threat of seizure of property. The taxpayer in *Baachus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984) sought a refund of wholesale excise liquor taxes paid under protest. *McKesson* was also a refund action, as were other notable *McKesson* progeny, such as *Reich v. Collins,* 513 U.S. 106 (1994) and *Fulton Corp. v. Faulkner,* 516 U.S. 325 (1996).

The states can be expected to continue their exploitation of the *McKesson* reference to their "flexibility" in responding when discriminatory tax schemes are successfully challenged. They will have every incentive to do so if they are permitted to enforce discriminatory assessments pertaining to periods which predate judicial acknowledgment of the tax scheme's constitutional infirmities. They will invoke the Court's initial deference to state law in fashioning remedies, as here, to disregard the Due Process Clause requirement for curing "the mischief [already] done."[10] As grounds for declining to eliminate unlawful discrimination for the contested tax period, the states will resort to statutes like the one relied on by Florida in this case, describing the remedy as the striking of exemptions. In addition to the statutes of some thirteen states which

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[10] *See Montana Nat'l Bank,* 276 U.S. at 504.

are express on this point, *see* Pet. at 18, the states can also be expected to rely on general severability provisions. *See e.g., Fulton Corp.*, 516 U.S. at 347 where the Court alludes to the possibility that the discriminatory taxation of intangibles in North Carolina might be cured by invalidating, under a severability clause, the deduction giving rise to the discriminatory treatment. As they have attempted to justify revenue misdeeds of constitutional proportion on the basis of "equitable considerations," *see Dryden, supra*, the states will point to the existence of some theoretical "predeprivation procedure," as in this case, to avoid reckoning with the requirement that their tax schemes be consistent with the provisions of the United States Constitution **at all times** and not just after they are found out. *See e.g., PIA New Jersey, Inc. dba Fair Oaks Hospital v. Director, Div. Of Taxation*, 13 N.J. Tax 94 (1993) (declining to grant a refund on grounds, among others, that the taxpayer did not pay under duress but could have availed itself of a prepayment challenge).

The states' profound reluctance, in the face of an admittedly unconstitutional tax scheme, to grant relief for prior periods is obvious. It is, in fact, their determination to etch away the Due Process rights of taxpayers, through the fabrication of procedural bars under *McKesson* and by resort to statutory and non-statutory concerns with the preservation of state treasuries, which suggests the importance of granting certiorari in this case. The Court should grant certiorari for the purpose of saying explicitly that the Due Process Clause requires meaningful backward-looking relief (whether by abatement of an assessment or by the assessment of those taxpayers which benefitted from the unconstitutional discriminaton) even when the taxpayer has not paid under duress, but has pursued a predeprivation procedure. No room should be left for the contention that the Due Process Clause operates for the benefit of those who seek refunds, but not for those who challenge an assessment of the same taxes. The

Court shoud grant certiorari for the purpose of clarifying that the "predeprivation procedure" mentioned in *McKesson* is one which allows the taxpayer to avoid having a discriminatory assessment enforced aganst it, a procedure which is a true Due Process counterpart to the "meaningful backward-looking relief" which a refund or other **post-payment** equalizer represents.

The Court should make clear that the "flexibility" accorded the states must always accommodate the Due Process Clause prohibition against an unlawful taking of property, that mitigation of past discriminaton is required in every instance and that the only matter left to the states is the means for eliminating the past and future effects of the discriminatory tax scheme. Certiorari should be granted in order that the Court may pronounce the ineffectiveness of statutory provisions expressing an intention to strike or sever exemptions and save taxes as a means of deflecting the Due Process Clause. And it should be granted to make clear that a taxpayer which has been subjected to an assessment under an unconstitutional tax scheme is entitled to relief from that assessment, in addition to its right to be free from such unconstitutional taxation in the future. Thus such rights would obtain even if the wrongfully-assessed taxpayer were to depart the state's jurisdiction and so never again be subject to its taxes. If the Court does not see fit to grant certiorari, the states will have every reason to ascribe truncating constructions to the Due Process Clause under *McKesson* and to invoke other statutory obstacles, notwithstanding the contrary import of *Newsweek* and *Dryden*. Taxpayers, on the other hand, will have lost the incentive for asserting their constitutional rights in a prepayment challenge; those who do so rather than paying the tax and seeking a refund will find themselves caught in a constitutional trap for the unwary. And notions of fair play between government and the governed will have slipped a little further away.

CONCLUSION

Like *McKesson* and *Newsweek*, this case presents an issue which is not confined to the State of Florida. Its implications are not restricted to use tax assessments. Other taxes might just as plainly contravene the strictures of the First Amendment or transgress other constitutional limits. The question at hand is the states' obligation under the Due Process Clause to respond in such circumstances. That is a matter of vital interest in every state in the nation and one which does not hinge on the type of revenue measure giving offense. For the reasons offered by the petitioner and those advanced herein, Amicus Curiae, the Institute for Professionals in Taxation, therefore urges that Sharper Image's petition for writ of certiorari be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1998

SHARPER IMAGE CORPORATION,

Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeals of Florida, First District

BRIEF OF *AMICUS CURIAE* DIRECT MARKETING ASSOCIATION, INC. IN SUPPORT OF PETITIONER

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The Direct Marketing Association, Inc. ("DMA") respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by Sharper Image Corporation ("Sharper Image"). Written consents of the parties are filed herewith.[1]

STATEMENT OF INTEREST

I. DMA: An Overview

DMA, a not-for-profit corporation, is the oldest and largest trade association representing mail order sellers and advertisers. Since the late 19th century, mail order marketing has attracted fledgling businesses and entrepreneurs who recognize the enormous opportunity of selling their products nationally. DMA has over 3,200 members from all fifty states and forty foreign countries. Most of DMA's members, like Sharper Image, sell by means of catalogs. They send those catalogs and other advertising materials through the mail, receive orders by mail and telephone, and deliver goods by common carrier.

In the last decade, DMA has filed *amicus curiae* briefs in state tax cases before this Court that have raised constitutional questions directly affecting its members in conducting their interstate business, including in *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 n.10 (1992) (citing DMA's brief), and *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24 (1988).

II. DMA's Interest In This Case

In this case, the court below acknowledged that taxing catalogs, while exempting newspapers and religious publications, violated Sharper Image's First Amendment rights. It held that Sharper Image had standing to raise this

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[1] No counsel for a party in connection with the petition for writ of certiorari authored this brief in whole or in part, and no other person or entity, other than *amicus curiae*, its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

constitutional challenge because it was injured by the exemption, a holding that was never challenged. *See* Appendix to Petition for Writ of Certiorari ("App.") at 10a. Nevertheless, the court denied any relief to cure this unconstitutional discrimination. The only remedy provided was invalidation of the tax exemption on a prospective basis so that previously exempt publications would be taxed in the *future*. The *prior* unconstitutional discrimination, however, was not addressed. No effort was made to tax newspapers and religious publications for past periods. Moreover, the state has refused to abate the unconstitutional assessment against Sharper Image.

The Florida Department of Revenue (the "Department") has assessed, or threatened to assess, DMA's members--in addition to Sharper Image--a use tax on catalogs for the same periods that newspapers and religious publications were fully exempt. The stipulations in this case indicate that the Department has not even attempted to assess newspapers and religious publications that received the benefit of the unlawful exemptions, yet it insists on collecting such taxes from DMA members. Initial Brief of Sharper Image, Fla. Dist. Ct. App., at 18-19 (collecting record citations). This is so despite this Court's admonition in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990) that, "the Due Process Clause of the Fourteenth Amendment obligates the state to provide meaningful backward-looking relief to rectify any constitutional deprivation." If the decisions below are sustained, therefore, DMA's members will find themselves liable for taxes which violate their constitutional rights without being afforded the due process protection of the Fourteenth Amendment.

Moreover, if upheld, the decisions below will not only impact on the Florida remedies available to DMA's members, they will also resonate in other states by providing a basis for such states to avoid providing the due process protections this Court has required. At least fifteen states have statutory provisions similar to those of Florida that, on their face,

preclude reasonable, backward-looking remedies for unconstitutional taxation.

In those states, as well as in Florida, state tax officials would be free to assess--and enforce--discriminatory and unconstitutional taxes without providing adequate remedies to those adversely affected. DMA's members would be left with the empty victory of having prevailed in the defense of their constitutional rights, but with no relief whatsoever from the discriminatory taxes of the past. Due process requires more than that.

STATEMENT OF THE CASE

DMA relies on the Statement Of The Case set forth at pages 4-8 of the Petition for Writ of Certiorari filed by Sharper Image. DMA notes the following critical aspects of the decision of the District Court of Appeal:

1. The court below ruled that Sharper Image had standing because its "constitutional claim ... involves a content-based approach to taxation of publications ..." App. at 10a. The court rejected the Department's argument that Sharper Image failed to show that it suffered "any injury by having assessed against it a use tax on the distribution of its catalogs ..." App. at 8a. This case involves content-based discrimination between publications, providing a clear basis for standing on the part of the publisher, Sharper Image, against which the unlawful discrimination was carried out.

2. The court below ruled that the newspaper exemption was unconstitutional because of its content-based discrimination between forms of speech and the press. App. at 10a (citing *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So.2d 459 (Fla. 1992)). The court also noted that Sharper Image's claim of unconstitutionality based upon the religious publications exemption might also be meritorious, but declined to reach that issue "given that the Florida Supreme Court has already found the newspaper exemption unconstitutional ..." App. at 11a.

3. Although finding that Sharper Image had standing, and having concluded that the company's constitutional claims were meritorious, the court below nonetheless refused to strike down the use tax assessment on Sharper Image's catalogs. Specifically, it rejected Sharper Image's claim that it should be entitled to "a meaningful backward-looking remedy" to address the unconstitutionality of Florida's sales and use tax statute.

The court relied solely upon a Florida statute which provides, in pertinent part, that if any of its sales and use tax exemptions are declared unconstitutional "such declaration shall not affect the tax or taxes imposed herein, but such . . . use . . . exempted or attempted to be exempted from the tax . . . shall be subject to the tax . . . to the same extent as if such exemption . . . had never been included herein." App. at 14a (quoting Fla. Stat. Ann. § 212.21 (West 1989)). According to the court below, this statute dictates that the *only* appropriate remedy in Sharper Image's case is to eliminate the unconstitutional exemption *on a prospective basis*, while leaving the assessment (and the tax exemption previously and unlawfully extended to sellers of newspapers and religious publications) intact. App. at 14a. In other words, in the eyes of the court below, § 212.21 creates a state statutory basis for providing prospective relief only. Although this remedy prevents unconstitutional taxation in the *future*,[2] it does not eliminate the past discrimination by abating the assessment of Sharper Image for the very same periods that newspapers and religious publications were exempt.

REASONS FOR GRANTING THE WRIT

This case involves an approach by a state's legislature-- accepted and applied by its courts-- that precludes reasonable, retroactive relief for an admittedly unconstitutional tax

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[2] The bar to discrimination in the future only relates to the exemption for newspapers. The exemption for religious publications is still on the books and has not yet been invalidated by the Florida courts.

assessment. This approach has been exacerbated by the Department's continuing efforts to exact taxes from Sharper Image and other distributors of catalogs for time periods when newspapers and religious publications were unconstitutionally exempt from taxation. Indeed, the Department has acknowledged that it has not attempted and will not attempt to tax these other publications.

Under Fla. Stat. Ann. § 212.21, the *only* relief available to parties like Sharper Image is the elimination of the unconstitutional exemption for *future* tax periods. They have *no* recourse whatsoever for assessments covering periods during which the unlawful exemptions were given full force and effect. This is directly contrary to this Court's decisions in *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442 (1998), *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 101 (1993), and *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990).

Florida is not isolated in its approach. Other states have also attempted to eliminate retroactive relief under circumstances such as these--either by statute or by the decisions of their courts. Intervention by this Court is necessary to ensure that DMA's members, including Sharper Image, and taxpayers in general have clear, certain, and meaningful remedies for unconstitutional tax assessments. This will prevent an erosion of this Court's long-standing principle that, under the Due Process Clause, a state must provide meaningful retroactive relief to remedy constitutional violations.

I. DMA's Members Are Entitled to Meaningful Backward-Looking Relief

This Court has made clear in several cases that prospective relief, alone, is not a sufficient remedy under the Due Process Clause for an unconstitutional tax assessment. Florida should not be allowed to avoid this rule by applying a statute that deprives taxpayers of any retroactive remedy.

In *McKesson*, *supra*, a Florida liquor excise tax provided preferential rate reductions for distributors of certain local products. 496 U.S. at 23. The Supreme Court of Florida agreed that the excise tax scheme was unconstitutional, but refused to order a tax refund. Instead, it merely enjoined future enforcement of the preferential rate reduction. This Court reversed:

> If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, *the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any constitutional deprivation.*

Id. at 31 (emphasis added). *Accord American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 181 (1990) ("Our decision today in *McKesson* makes clear that once a State's tax statute is held invalid under the Commerce Clause, the state is obligated to provide relief consistent with federal due process principles.") To satisfy due process, "a state may either award full refunds to those burdened by an unlawful tax or issue some other order that 'create[s] in hindsight a nondiscriminatory scheme.'" *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 101 (1993) (quoting *McKesson*, 496 U.S. at 40). Where, as here, a tax scheme is unconstitutional due to its discriminatory effect, the state may only insist upon payment of its tax assessments if it retroactively removes the discrimination. *McKesson*, 496 U.S. At 39-40. It can do so by assessing those taxpayers who enjoyed the benefit of the unconstitutional exemptions. *Id.* Otherwise, it must neither collect nor keep the taxes imposed under its unconstitutional scheme. *Id.*[3]

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[3] In its decision, the Court of Appeal suggests that the meaningful retroactive relief requirement of *McKesson* has no applicability because Sharper Image does not compete with sellers of newspapers and religious publications. App. at 15a. Nowhere in *McKesson* did this Court require a

In *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442 (1998), this Court summarily vacated and remanded a decision of the same District Court of Appeal that denied the post-deprivation remedy of refund of taxes assessed to taxpayers injured by the very same newspaper exemption at issue in this case. There, this Court ruled that "Newsweek is entitled to a clear and certain remedy... for this constitutionally invalid exemption." *See also Dryden v. Madison County*, 118 S.Ct. 1162 (1998) (vacating Florida Supreme Court decision refusing to make a full refund to taxpayers illegally assessed a tax).

II. Florida Has Made No Attempt to Cure Past Discrimination In Taxation, But Instead Has Assessed or Threatened To Assess DMA Members.

The second teaching of *McKesson* is that the state must act *swiftly* to fashion a retroactive remedy if it wishes to retain the taxes it has collected or assessed under a discriminatory tax scheme. Despite having had a substantial opportunity to do so, neither the Florida legislature nor the Department have formulated a meaningful retroactive remedy to cure the discriminatory aspects of its sales and use tax scheme related to the newspaper and religious publications exemptions.

Following the invalidation of the newspaper exemption (by the Supreme Court of Florida in 1992, *see Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So.2d 459 (Fla. 1992)) and the religious publications exemption (by the United States Supreme Court in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989)), neither the legislature nor the Department

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showing that the taxpayer was in direct competition with those who benefited from the unconstitutional tax exemption. *See Petition for Writ of Certiorari of Sharper Image Corporation* at 14 n.6 (citing *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989)). Moreover, Sharper Image satisfied the standing requirements applied by the lower court by demonstrating that it had suffered injury as a result of the unconstitutional exemptions.

took any steps to impose retroactively sales and use taxes on the beneficiaries of these exemptions. Not only does the Department now lack the practical power to do so given its admitted inability to determine even the identities of those taxpayers, it also faces--due to its own inaction--the additional legal hurdle presented by the statute of limitations. Fla. Stat. Ann. § 95.091(3) (a) (an assessment must be made within 5 years from the date the return is filed); Initial Brief of Sharper Image Corporation, Fla. Dist. Ct. App., at 19 (collecting record citations).

Notwithstanding its refusal to impose taxes on the exempt publications, the Department has simultaneously assessed or threatened to assess several of DMA's members for the period in which the newspapers and religious publications were exempt. Thus, the constitutional discrimination for past periods is manifest.

If the District Court of Appeal's decision is not reversed, the Department will have found a way to avoid the due process requirement of meaningful backward-looking relief. This will harm not only Sharper Image but the other DMA members and other taxpayers faced with enforcement efforts by the Department predicated on unconstitutional statutes.

III. Failure To Reverse The District Court of Appeal's Decision Would Have Profound Repercussions For DMA's Members And Other Taxpayers In Jurisdictions Throughout the United States, Including Florida

The Florida remedial statute which was relied upon by the court below, Fla. Stat. Ann. § 212.21, is not unique. At least fifteen other states have laws that could similarly bar retroactive relief where a statutory tax provision is found to be unconstitutional. Taken at face value, those statutes purport to limit the remedy available to taxpayers like Sharper Image to removal of the offending tax provision on a forward-looking basis. *See, e.g.*, Alaska Stat. § 01.10.030 (1998) (applying the Florida rule--no apparent backward-looking

remedy in cases where some part of the tax law is deemed unconstitutional); Cal. Gov't Code § 55821 (West 1997) (applying the Florida rule to local transaction and use taxes); Del. Code Ann. Tit. 5, § 1110 (1997) (applying the Florida rule to the taxation of banks and trust companies); 35 Ill. Comp. Stat. Ann. 105/18-18 (West 1996); Kansas Stat. Ann. § 79-2011 (1997) (applying the Florida rule to real property taxes); Minn. Stat. Ann. § 168.76 (West 1986) (applying the Florida rule to the taxation of motor vehicle sales); Miss. Code Ann. § 27-10-23 (Supp. 1998); R.S. Mo. § 1.140 (1997) (applying the Florida rule to all tax statutes); N.J. Stat. Ann. § 54:32B-29 (West 1986) (applying the Florida rule to sales and use taxes); N.Y. Real Prop. Tax Law § 1172 (McKinney 1989) (same rule, regarding real property taxes); R.I. Gen. Laws § 44-7-21 (1997) (identical in material respects to Florida's statute, and providing that a judgment of unconstitutionality shall only invalidate an exemption prospectively); S.C. Code Ann. § 10-52-6 (Michie 1998) (same); S.D. Codified Laws § 10-52-6 (1998) (applying the Florida rule to municipal non-ad valorem taxes); Wash. Rev. Code Ann. § 82.18.900 (West 1997) (applying the Florida rule to solid waste excise taxes); W. Va. Code § 11-21-94 (1998) (applying the Florida rule to personal income taxation).

Court in other states have also followed the Florida approach. For example, in *Thayer v. South Carolina Tax Commission*, 413 S.E.2d 810 (S.C. 1992), the Supreme Court of South Carolina refused to provide a retroactive remedy to a taxpayer because the exemption challenged, while unconstitutional, was not clearly so at the time the tax at issue was collected. More recently, in *H.J. Wilson v. State Tax Commission*, No. 97-CA-00121-SCT, 1998 WL 427261 (Miss. July 30, 1998), the Mississippi Supreme Court refused to provide the retroactive relief of a refund despite finding a tax exemption for newspapers and certain scientific, literary, or educational periodicals unconstitutional.

If the decision of the lower courts is upheld, these states could impose unconstitutionally discriminatory taxes without being required to remedy fully such constitutional violations. This would jeopardize the fundamental protections afforded by the Due Process Clause in contravention of this Court's precedent.

CONCLUSION

In light of the foregoing, *Amicus Curiae* The Direct Marketing Association respectfully submits that the petition for a writ of certiorari should be granted and the case be reversed.

Dated: February 10, 1999

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No. 98-957

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SHARPER IMAGE CORPORATION,
Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

REPLY BRIEF FOR PETITIONER

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RULE 29.6 LISTING

Sharper Image Corporation has no parent companies or nonwholly owned subsidiaries.

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REPLY BRIEF FOR PETITIONER

I. CERTIORARI SHOULD BE GRANTED BECAUSE FLORIDA ADMITS THAT THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

Certiorari is warranted because the Florida Department of Revenue's opposition to the Sharper Image Corporation's ("Sharper Image") petition concedes that the district court of appeal "decided an important question of federal law . . . in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). Florida now "acknowledge[s] that, insofar as the district court of appeal indicated that the State need not provide relief to a taxpayer establishing unconstitutional discrimination in a predepri-

vation challenge, its position is inconsistent with the principles set forth in *McKesson* [*Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990)] and *Newsweek* [*v. Florida Department of Revenue*, 118 S. Ct. 904 (1998)]. *See also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993); *Reich v. Collins*, 513 U.S. 106 (1994)." Op. Cert. 4-5. Florida further admits that due to "its mistaken reliance on its earlier opinion in *Newsweek*—not yet vacated by this Court—the court of appeal did not fully recognize [its] obligation" to "provide an adequate remedy to taxpayers successfully challenging state taxes on federal constitutional grounds . . . regardless of whether the taxpayers pursue predeprivation or postdeprivation procedures" Op. Cert. 5.[1]

Notwithstanding this confession of error, Florida now contends that review is not warranted because this case is "not of any general importance" since the district court of appeal's decision "is not a decision of the state Supreme Court," "the State, having acknowledged error below, will not be able to assert the decision as controlling authority to deny relief in other suits by taxpayers making constitutional objections," and Sharper Image "is not, in fact entitled to any relief." *See* Op. Cert. 10. Florida's new contentions are without merit.

First, that the decision below is "only [a decision] of an intermediate appellate court" is irrelevant. For purposes of consideration by this Court, the district court of appeal's decision, which the Florida Supreme Court refused to review, is treated as one rendered by "the highest court of a State." *See Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954).

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[1] This confession of error dramatically departs from Florida's position in its opposition to Sharper Image's petition for discretionary review by the Florida Supreme Court. *See, e.g.*, Respondent's Brief on Jurisdiction, Fla. S. Ct., at 7 & 9 (contending that this Court's decision in *Newswek* had "no bearing on this case," and that the district court of appeal's decision was "not inconsistent with any decision of the United States Supreme Court on the interpretation of the Due Process Clause.").

Second, that the Department of Revenue has conceded the error of a court below in its opposition is unlikely to change the massive resistance of Florida and its courts to this Court's repeated determinations that states must provide clear, certain, and meaningful remedies to victims of unconstitutionally discriminatory taxation. *See* Pet. 16-17.[2] That resistance is ongoing. Just weeks ago, the Florida Supreme Court reaffirmed a decision this Court had vacated and remanded for reconsideration in light of *Newsweek*. *See Dryden v. Madison County*, No. 87-594, 1999 WL 22612 (Fla. Jan. 21, 1999) (hereinafter "*Dryden II*") (set forth in Appendix A), *reaff'g Dryden v. Madison County*, 696 So.2d 728 (Fla. 1997), *vacated*, 118 S. Ct. 1162 (1998). In so doing, the Florida court again denied a full refund to taxpayers who had successfully challenged special assessments imposed by a county on their property, claiming that this case "could not be more different [from *Newsweek*]—it is not a tax 'remedy' case." App. 5a.

Dryden II represents yet another attempt by Florida to avoid remedying unconstitutionally discriminatory taxation on preposterous grounds. As the dissenting justices in *Dryden II* noted, "[t]his is a tax remedy case" because "the fundamental issue before us in this case continues to be the issue framed by the First District when the case was certified to us, which is whether our decision in *Gulesian v. Dade County Sch. Bd.*, 281 So.2d 325 (Fla. 1973), is still valid after the Supreme Court's decision in *McKesson*. The issue in both *Gulesian* and *McKesson* was whether taxpayers had remedies available after taxing schemes were found to be invalid." App. 7a. The dissenters correctly noted that the majority had "giv[en] the vacation of judgment [by this Court] an empty meaning." App. 7a.

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[2] Even the Department's confession is half-hearted. *See* Op. Cert. 4 ("the State has now acknowledged that *some* of that analysis is in error") (emphasis addedd). This concession hardly provides assurance that Florida will begin providing meaningful relief to victims of discriminatory taxation.

Certiorari is therefore warranted to ensure that Florida respects the rights of injured taxpayers.

The importance of review is further demonstrated by the fact that: (1) courts in other states have denied taxpayers relief on similarly flawed grounds, *see* Pet. 17-18; (2) at least thirteen other states have enacted statutes similar to the one relied upon by the district court of appeal in denying Sharper Image a remedy, *see* Pet. 19; and (3) numerous states, including Florida, continue to grant tax exemptions to newspapers and/or religious publications.[3] This case therefore concerns not just "retroactive relief for years long past." Op. Cert. 8. Rather, the important issues in this case are certain to recur, and are now ripe for decision. *See* Pet. 15.

II. CERTIORARI SHOULD BE GRANTED BECAUSE FLORIDA'S NEWLY MINTED JUSTIFICATIONS FOR DENYING SHARPER IMAGE A REMEDY ARE WITHOUT MERIT.

A. Contrary to Its Advocate's Claims, Florida's Tax Scheme Does Not Discriminate Against Commercial Speech. Florida Discriminates Against All Publications That Are Not Newspapers or Religious.

Having confessed error on the important question of federal law petitioner raises, Florida tries to evade the force of its own confession by changing the subject. Florida now argues, for the first time, that Sharper Image is not

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[3] *See e.g.*, Cal. Rev. & Tax Code §§ 6362.7 & 6362.8 (West 1998) (newspapers and periodicals); Fla. Stat. Ann. § 212.06(9) (West 1998) (religious publications); Ind. Code Ann. § 6-2.5-5-17 (West 1989) (newspapers); Iowa Code Ann. § 422.45(9) (West 1998) (newspapers); La. Rev. Stat. Ann. § 305.14(A)(1) (West 1990) (religious newspapers); Mich. Comp. Laws Ann. § 205.94(n) (1998) (newspapers and periodicals); Neb. Rev. Stat. § 77-2704.07 (1998) (newspapers); Nev. Rev. Stat. § 372.315 (1997) (newspapers); N.J. Stat. Ann. § 54:32B-8.5 (West 1986) (newspapers, magazines, and periodicals); Okla. Stat. Ann. § 1354(1)(A) (West 1992) (newspapers and periodicals); Tex. Tax Code Ann. § 151.319 (West 1992) (newspapers).

entitled to a remedy because Florida's tax laws provide differential treatment based on the "commercial" and "noncommercial" nature of the publications at issue. *See* Op. Cert. 5-10. That is a misrepresentation of what Florida, along with other states, has done.[4]

Florida's tax laws do not give preferential tax treatment to "noncommercial" publications over "commercial" publications. Rather, Florida law exempts "newspapers" and "religious publications" from the use tax, without regard to the "commercial" or "noncommercial" nature of the publications involved. *See* Fla. Stat. Ann. §§ 212.05(1), 212.08(7)(w) (West 1989) & Fla. Stat. Ann. § 212.06(9) (West 1998). A publication carrying only advertisements for such things as apparel for priests, ministers, and rabbis would be both religious and commercial but would, presumably, qualify for the exemption as religious since Florida did not make dispositive a publication's nature as commercial or noncommercial. Thus, whatever analysis might be employed had the Florida legislature distinguished between commercial and noncommercial speakers, that analysis is not applicable here. *See, e.g., H.J. Wilson Co. v. State Tax Comm'n*, No. 97-CA-00121-SCT, 1998 WL 427261 (Miss. July 30, 1998) (holding that catalog publisher's constitutional challenge of newspaper tax exemption did "not challenge a regulation restricting commercial speech but rather . . . a content-based discriminatory sales tax scheme").[5]

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[4] Florida contends that it may defend the judgment below on this ground because it raised the argument in the district court of appeal. *See* Op. Cert. 5 n.4. In the cited portion of its district court of appeal brief, Florida argued that its tax exemptions survive rational basis scrutiny under the Equal Protection Clause, stating that "[t]he difference in the taxation of publications and advertising is legitmate and supportable . . . because the modes of communication are inherently and essentially different." Department of Revenue's Amended Answer Brief, Fla. Dist. Ct. App., at 29. Florida did not, as it suggests, contend that the discriminatory tax exemptions were sustainable under the commercial speech doctrine.

[5] Unlike Florida's tax laws, postal regulations which distinguish between "general publications" and "advertisements," *see* Op. Cert. 7, explicitly classify publications based on the commercial or

Moreover, even if Florida's characterization of its laws were correct, Respondent's newly minted argument would effectively add a new "Question Presented" which was not litigated in the courts below, *i.e.*, whether a state may discriminate against commercial speech in favor of noncommercial speech in granting tax exemptions. This Court has not yet decided whether laws which *discriminate* between commercial speech and noncommercial speech, as opposed to laws which *regulate* commercial speech, should be analyzed under the First Amendment standards applicable to commercial speech, or under those standards applicable to regulations affecting fully protected speech. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 & n.11 (1993) (noting that the Court was not deciding whether the court of appeals correctly held that "the lesser status of commercial speech is relevant only when its regulation was designed to prevent false or misleading advertising, or to alleviate distinctive adverse effects of the speech at issue"). Thus, if the Court were to deny certiorari on the theory Florida advances, it would allow to stand, for the first time, *sub silentio*, a controversial First Amendment proposition. Florida's new attempted justification, if it had any merit, would provide an additional reason for granting the writ.

B. Sharper Image Has Standing to Raise This Discrimination Claim.

This Court's decisions also make clear that *all* nonbeneficiaries of unconstitutionally discriminatory tax exemptions have standing to challenge such exemptions. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S.

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noncommercial nature of the publications' content. *See* 39 C.F.R. pt. 3001 subpt. C, App. A. §§ 412.2, 412.4 (1998) (distinguishing between "general publications" and those "designed primarily for advertising purposes"). Similarly, the federal statute governing public broadcasting funding, *see* Op. Cert. 7, explicitly prohibits a public broadcast station from "mak[ing] its facilities available to any person for the broadcasting of any advertisement." 47 U.S.C. § 399b(b)(2).

221 (1987), for example, the publisher of a general interest magazine challenged as violative of the First and Fourteenth Amendments Arkansas' sales tax exemption for newspapers and religious, professional, trade, and sports journals. *See* 481 U.S. at 221. This Court reversed the Arkansas Supreme Court's holding that the magazine lacked standing to challenge the exemptions because "[i]t would avail [appellant] nothing if it wins its argument. . . ." *Id.* at 226. Instead, the Court said:

> We do not accept the Commissioner's notion of standing, for it would effectively insulate underinclusive statutes from constitutional challenge. . . . Contrary to the Commissioner's assertion, appellant has alleged sufficient a personal stake in the outcome of this litigation. "The holding of the Arkansas court stands as a total bar to appellant's relief; its constitutional attack holds the only promise of escape from the burden that derives from the challenged statute."

Id. at 227 (alterations omitted) (quoting *Orr v. Orr*, 440 U.S. 268, 273 (1979)); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8 (1989) (rejecting as "misguided" and inconsistent with *Arkansas Writers' Project* Texas's argument that the publisher of a general interest magazine lacked standing to challenge on First Amendment grounds Texas's sales tax exemption for religious publications).

The Court's decisions in *Arkansas Writers' Project* and *Texas Monthly* were not based on the "noncommercial" nature of the publications at issue. Rather, they rested on the fact that unconstitutionally discriminatory tax exemptions "burden[] non-beneficiaries," *see Texas Monthly*, 489 U.S. at 18 n.8, and a "constitutional attack holds the only promise of escape from the burden that derives from the challenged statute," *Arkansas Writers' Project*, 481 U.S. at 227 (internal quotation marks and alterations omitted). Like the nonbeneficiaries in those cases,

Sharper Image has standing to challenge the discriminatory exemptions at issue here.

Also, contrary to Florida's assertion that Sharper Image has no standing to bring a "derivative claim" to vindicate "the rights of third parties," *See* Op. Cert. 8-9, Sharper Image seeks to vindicate its own rights as a taxpayer injured by unconstitutionally discriminatory taxation. *Arkansas Writers' Project* and *Texas Monthly* demonstrate that Sharper Image is within the class of nonbeneficiaries with standing to do so. Moreover, to the extent that any question remains regarding the standing of commercial nonbeneficiaries to challenge unconstitutionally discriminatory tax exemptions, that question is itself independently worthy of this Court's consideration.[6]

Even assuming the commercial speech doctrine were applicable in this case, however, Florida cannot justify its discriminatory taxation with a "bare assertion [of] the 'low value' of commercial speech." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993). Rather, Florida bears the burden of proving that its differential treatment of commercial speech "directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994). Florida may not

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[6] Florida's reliance upon *Leathers v. Medlock*, 499 U.S. 439 (1991), *see* Op. Cert. 6, is also misplaced. There, the Court held that Arkansas' sales tax scheme, which exempted newspapers, magazines, and satellite broadcast services, but did not exempt cable television providers, did not violate the First Amendment because, *inter alia*, the exemptions were speaker-based, not content-based like the ones at issue here. *See id.* at 447-49. Indeed, the Florida Supreme Court distinguished *Leathers* on that very ground in striking down Florida's newspaper exemption. *See Department of Revenue v. Magazine Publishers*, 604 So. 2d 459, 462 (striking down Florida's newspaper exemption and holding that, "unlike *Leathers*, the record shows that the content of a publication is a key factor in determining whether the publication is subject to taxation").

meet this burden "by mere speculation or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

Yet, here, Florida has asserted *no* interest, much less a substantial interest, in support of its advocate's assertion of Florida's right to discriminatorily tax commercial speech. It follows that Florida's counsel has not shown that its entirely hypothetical discriminatory taxation of commercial speech would materially advance a substantial state interest in a manner no more extensive than necessary to serve that interest. For these reasons, even if the commercial speech doctrine were applicable in this case, Florida has failed to meet its First Amendment burden of justifying its discriminatory taxation of commercial speech.

CONCLUSION

For the reasons set forth here and in Sharper Image's petition for a writ of certiorari, the petition for a writ of certiorari should be granted. In the alternative, especially given Florida's confession of error, the Court should grant the petition, vacate, and remand the case.

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February 22, 1999

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APPENDIX

APPENDIX

SUPREME COURT OF FLORIDA

No. 87,594

QUINTON DRYDEN *et al.*,
Petitioners,

v.

MADISON COUNTY, FLORIDA,
Respondent.

[January 21, 1999]

CORRECTED OPINION

SHAW, J.

This case is before the Court on remand from the United States Supreme Court for reconsideration of our decision in Dryden v. Madison County, 696 So.2d 728 (Fla. 1997), vacated, 118 S.Ct. 1162 (1998). We reaffirm our decision in Dryden.

1. Facts

The facts are set out fully in this Court's initial opinion on review. See Dryden v. Madison County, 696 So.2d 728 (Fla.1997). Madison County in 1989 adopted several ordinances levying special assessments on property located in the county to pay for garbage services, landfill closure, ambulance service, and fire protection. Several years later, the assesments were declared invalid, and Dryden and other residents sought refunds. The trial court found that the county had acted in good faith in levying the 1989 and 1990 assessments and that Dryden was un-

entitled to a refund for those years. The district court affirmed. We approved the district court decision:

> Where an invalid tax scheme discriminates among citizens without a legal basis and bestows no commensurate benefit, a refund may be in order. Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994). Otherwise, the tax could constitute an unlawful taking of property in violation of state and federal rights. McKesson Corp. v. Division of Alcoholic Beverages & Tobbaco, 496 U.S. 18 (1990). Where an invalid tax scheme applies across the board and confers a commensurate benefit, on the other hand, "equitable considerations" may preclude a refund. Gulesian v. Dade County School Board, 281 So.2d 325 (Fla.1973).
>
> In the present case, the 1989 and 1990 assessments fall in the latter category. The assessments were nondiscriminatory (i.e., they applied across the board to all property owners in the county) and they conferred a commensurate benefit (i.e., they provided for garbage collection and disposal, landfill closure, ambulance service, and fire protection). Further, the county acted in good faith in imposing these assessments. Competent substantial evidence supports the denial of refunds for 1989 and 1990.

Dryden, 696 So.2d 729-30 (footnotes omitted).

The United States Supreme Court subsequently vacated our decision in Dryden in light of its just-released opinion in Newsweek, Inc. v. Florida Dep't of Revenue, 118 S.Ct. 904 (1998). The decision vacating Dryden was brief and without analysis:

> On petition for writ of certiorari to the Supreme Court of Florida. Petition for writ of certiorari granted. Judgment is vacated and the case is remanded to the Supreme Court of Florida for further consideration in light of Newsweek, Inc. v. Florida

Department of Revenue, 522 U.S. 442, 118 S.Ct. 904, 139 L.Ed.2d 888 (1998).

Dryden v. Madison County, 118 S.Ct. 1162 (1998). This Court ordered briefing by the parties concerning the effect of Newsweek on our decision in Dryden, and Dryden now contends that Newsweek mandates a refund. We disagree.

2. Newsweek v. Florida Dep't of Revenue

Newsweek is a tax "remedy" case. This Court in Department of Revenue v. Magazine Publishers of America, Inc., 565 So.2d 1304 (1990),[1] declared unconstitutional a statutory scheme that imposed a sales tax on magazines but not newspapers. Relying on this ruling, Newsweek, a magazine, sought a tax refund, claiming that it had been compelled to pay taxes pursuant to the unconstitutional scheme. The trial court did not reach the merits of the claim but rather granted summary judgment against Newsweek. The district court of appeal affirmed. Newsweek, Inc. v. Department of Revenue, 689 So.2d 361 (Fla. 1st DCA 1997). The district court reasoned that Newsweek should have availed itself of the prepayment remedy under section 72.011, Florida Statutes (1987), which allowed a taxpayer to file suit and pay the contested amount into the court registry rather than to the government. 689 So.2d at 363-64.

The United States Supreme Court granted certiorari and vacated the district court decision, pointing out that a different statutory provision, section 215.26, Florida Statutes (1987), authorized a postponement remedy wherein the taxpayer could pay the tax first and file suit later. The federal Court reasoned:

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[1] This decision was subsequently vacated and remanded and then reaffirmed. See Department of Revenue v. Magazine Publishers of America, Inc., 565 So.2d 1304 (1990), vacated sub nom., Miami Herald Publ'g Co. v. Department of Revenue, 499 U.S. 972 (1991), reaffirmed, 604 So.2d 459 (Fla.1992).

> The effect of the District Court of Appeal's decision below, however, was to cut off Newsweek's recourse to § 215.26. While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax.

Newsweek, 118 S.Ct. at 905. The federal Court concluded that Newsweek was entitled to proceed via the postpayment route and obtain an adjudication on the merits of its refund claim: "Newsweek is entitled to a clear and certain remedy and thus it can use the refund procedures [in section 215.26] to adjudicate the merits of its claim." Id. at 905.

3. Application to Present Case

Newsweek is inapplicable to the present case. The United States Supreme Court in Newsweek never reached the merits of the refund issue but rather focused only on the remedy that must be made available to a taxpayer seeking an adjudication on the merits of a refund claim. Specifically, the federal Court held that a taxpayer cannot be cut off from a remedy, or avenue of redress, upon which the taxpayer has reasonably relied. The taxpayer is entitled to proceed upon that avenue and at some point obtain an adjudication—either yea or nay—on the merits of his or her refund claim.

Until the United States Supreme Court stepped in, Newsweek had never obtained an adjudication on the merits of its refund claim. (As noted above, the trial court had granted summary judgment against Newsweek, and the district court had said that Newsweek was not entitled to seek a refund because Newsweek had failed to comply with the statutory prepayment requirements.) The United States Supreme Court vacated the district court judgment and held that Newsweek was entitled to proceed via the

postpayment route and obtain an adjudication on the merits.

The present refund case could not be more different—it is not a tax "remedy" case. In fact, the remedy that Dryden has chosen has never been in issue in these proceedings. Dryden has proceeded via the postpayment route (i.e., he paid the assessments first and then filed suit), and—unlike the situation in Newsweek—the government has not asserted and the courts have not held that he is unentitled to do so. Rather, the parties and courts have viewed the availability of the postpayment remedy as a "given" in this case and have focused exclusively on the merits of Dryden's refund claim (i.e., on whether Dryden and other taxpayers are in fact due a refund). This case thus begins precisely where Newsweek left off.

Dryden has pursued his claim to completion at every level. He has obtained an adjudication on the merits from three separate tribunals—the trial court, the district court (twice), and this Court. He ultimately lost at each stage—fair and square.[2] The analysis in Newsweek, which focuses on a taxpayer's remedy for seeking a refund, is inapplicable to this "merits" case. Simply put: The remedy here is not in issue and never has been.

Based on the foregoing we reaffirm our decision in Dryden v. Madison County, 696 So.2d 728 (Fla.1997), in its entirety.

It is so ordered.

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[2] As noted above, this Court in Dryden held that although the special assessments were levied pursuant to a technically invalid ordinance, Dryden was not entitled to a refund for good reason: (1) the assessments were nondiscriminatory, i.e., they applied across the board to all property owners; (2) the assessments conferred a commensurate benefit on the taxpayers, i.e., in return for the assessments, the taxpayers were provided with garbage collection and disposal, landfill closure, ambulance service, and fire protection; and (3) the assessments were enacted in good faith.

HARDING, C.J., ANSTEAD, J., and KOGAN, Senior Justice, concur.

WELLS, J., dissents with an opinion, in which PARIENTE, J., and OVERTON, Senior Justice, concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

WELLS, J., dissenting.

I dissent because the majority errs in concluding that the United States Supreme Court's vacation of this Court's judgment in this cause and remand to us for further consideration in light of Newsweek, Inc. v. Florida Department of Revenue, 118 S.Ct. 904 (1998), should have no impact upon our decision in this case.

My reading of the Newsweek decision finds two clear statements by the United States Supreme Court which, when applied to this case, require rescinding the remanded judgment and opinion of this court. In the first statement, the Court noted with approval the Florida First District Court of Appeal's acknowledgment of the requirement of McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990), that there be a " 'meaningful backward-looking relief' when a taxpayer is forced to pay a tax before having an opportunity to establish its unconstitutionality." Newsweek, 118 S.Ct. at 904. In the second statement, the Court held that:

> While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax.
>
> Newsweek is entitled to a clear and certain remedy and thus it can use the refund procedures to adjudicate the merits of its claim.

Newsweek, 118 S.Ct. at 905.

Newsweek reinforces the fact that when the state or a state-authorized taxing unit subjects a taxpayer to an unauthorized payment, McKesson requires either (1) a "predeprivation process" authorizing taxpayers to challenge the validity of a payment prior to making the payment, or (2) postpayment "meaningful relief." If no prepayment procedure exists, as in this case, then postpayment "meaningful relief" must include a refund if the taxpayer has a meritorious claim. It is an inescapable fact that the act of refunding money to the taxpayer is what makes the relief meaningful.

The majority gives the vacation of the judgment an empty meaning by asserting that:

> [This] is not a tax "remedy" case. . . . Dryden has proceeded via the postpayment route. . . . Rather, the parties and courts have viewed the availability of the postpayment remedy as a "given" in this case and have focused exclusively on the merits of Dryden's refund claim (i.e., on whether Dryden and other taxpayers are in fact due a refund). This case thus begins precisely where Newsweek left off.

Majority op. at 4.

This is a tax remedy case. The fundamental issue before us in this case continues to be the issue framed by the First District when the case was certified to us, which is whether our decision in Gulesian v. Dade County School Board, 281 So.2d 325 (Fla.1973), is still valid after the Supreme Court's decision in McKesson. The issue in both Gulesian and McKesson was whether taxpayers had remedies available after taxing schemes were found to be invalid.[3] In Gulesian, we held that although a re-

[3] In McKesson, the only reason a refund was not specifically ordered was that the challenged liquor tax was not found to be invalid in its entirety but rather was invalid only insofar as it operated in a manner that discriminated against interstate commerce. Therefore, the Supreme Court allowed either a refund or other

fund to taxpayers would be the normal remedy after a tax was invalidated, an exception was warranted under the facts of Gulesian and thus the refund remedy was not available in that case. In McKesson, the United States Supreme Court held that a postpayment remedy was mandatory in a situation in which no prepayment procedure existed and that remedy had to be a refund or its equivalent. McKesson specifically states:

> Had the Florida courts declared the Liquor Tax invalid either because (other than its discriminatory nature) it was beyond the State's power to impose, as was the unapportioned tax in [Atchison, Topeka & Santa Fe Ry. v. O'Connor, 223 U.S. 280 (1912)], or because the taxpayers were absolutely immune from the tax, as were the Indian Tribes in [Ward v. Board of County Commissioners, 253 U.S. 17 (1920); and Carpenter v. Shaw, 280 U.S. 363 (1930)], no corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have had no choice but to "undo" the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to "collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment."

McKesson, 496 U.S. at 39 (emphasis added) (quoting Ward, 253 U.S. at 24).

The Supreme Court made this patent in McKesson by citing to its earlier decision regarding a tax on certain Indian tribe lands in Ward v. Board of County Commissioners, 253 U.S. 17 (1920):

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retroactive relief that would cure the discriminaton. McKesson, 496 U.S. at 51. In this case, the assessments were held to be null and void based on the county's failure to substantially comply with the statutory authority under which it purported to act. See Madison County v. Foxx, 636 So.2d 39, 48 (Fla. 1st DCA 1994).

We explained the State's duty to remit the tax as follows:

> "To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State."

McKesson, 496 U.S. at 33-34 (quoting Ward, 253 U.S. at 24). Applying this rule to the remand of this case requires the conclusion that not only is this a tax remedy case but that the tax remedy must include a refund.

The United States Supreme Court asks us to reconsider this case in light of Newsweek, which reiterates the McKesson due-process requirement that a taxpayer who has only the availability of a postpayment refund, as did Dryden, should receive the "clear and certain remedy" of "meaningful backward-looking relief." In McKesson, the Supreme Court expressly rejected equitable exceptions to the refund requirement. McKesson at 46-47. In Newsweek, the Court did not mention any good-faith equitable exception. This substantiates my serious reservations as to the continued vitality of Gulesian under any circumstances. I believe the correct answer to the First District's certified question is that the Gulesian exception is not still valid. However, even though the question certified to us by the First District is as to the continued viability of the Gulesian exception after the McKesson decision, we do not have to reach that issue to decide whether refunds are required in this case. Rather, I believe the following from my dissent in this case could be adopted:

> Moreover, although neither McKesson II nor Kuhnlein specifically overruled Gulesian, the continuing vitality of Gulesian in light of these decisions is ques-

tionable. Nevertheless, even if Gulesian is still good law, I do not believe the very limited exception afforded by Gulesian to be applicable here. The evidence in this case does not establish that the County acted within the "good faith" parameters of Gulesian. In Gulesian, this Court upheld a trial court's ruling that equitable considerations precluded refunds of taxes based on a presumptively valid statute which was later ruled unconstitutional. The Court gave two reasons for its decision: ordering a refund in the small amounts that would be required would impose an intolerable burden on the school board; and the school board acted in good faith in relying on a presumptively valid statute and to impose a refund would compound the school board's fiscal problems. However, the particularly persuasive fact was that the taxing authority relied upon a presumptively valid statute which had been so held by a trial court but later reversed by the appellate court. This point was recognized in Coe v. Broward County, 358 So.2d 214, 215-16 (Fla. 4th DCA 1978), in which the court noted that Gulesian had carved out a very narrow exception to the taxpayer's right to a refund and that good faith was clearly evident in Gulesian because the school board acted at all times in accordance with the law as then interpreted by the courts and enacted by the legislature.

Unlike the taxing authority in Gulesian, the County did not act in reliance on a state statute caught up in a reversed court interpretation as to its constitutionality. Rather, the County failed to comply with the precise statute it relied upon in enacting its ordinances. Although the County drafted its ordinances and levied assessments based upon advice from various sources, a government with the power to exact property from its citizens clearly should be held to a standard that it will know and follow the law. Perhaps those who gave the County the erroneous advice

> concerning the adoption of the ordinances should have the ultimate responsibility, but those who paid under the threat of the County's power to exact the payment should not be held to have no recourse against the unlawful exaction.
>
> The facts presented in this case are simply so different from what occurred in Gulesian that it is erroneous to apply the good-faith exception of Gulesian. See McKesson II, 496 U.S. at 46-47 (state's reliance on statute similar to one found unconstitutional several years earlier precluded state's reliance on an equitable justification to avoid affording relief).

Dryden v. Madison County, 696 So.2d at 728, 732-33 (Fla.1997) (Wells, J., dissenting) (citations and footnote omitted). Since this case is so different factually from Gulesian, we could leave to another day the issue of whether a case resembling Gulesian allows for the application of a Gulesian exception to "meaningful relief," including a refund.

In this case, however, we plainly are in error if we continue to ignore, as the majority does, just how patently discriminatory and inequitable the refusal to refund the payment is in this case. The Madison County assessments were treated identically to ad valorem taxes insofar as collection was concerned. No prepayment mechanism existed for challenging the assessments. If assessments were not paid, liens attached to the property owners' real property, and upon becoming delinquent, the amount of the liens accrued interest at eighteen percent per annum. Nonpayment resulted in the sale of tax assessment certificates.

Precisely contrary to the majority's assertion in its footnote 2, the assessments did not apply across the board to all property owners in this case. Approximately one-half of the property owners in Madison County did not pay the assessments, and liens attached to their properties.

Subsequently, the County canceled the liens by purchasing all assessment certificates sold to third parties for non-payment. In reality, the property owners who did not pay, and thus failed to comply with the law, never had to pay. On the other hand, the property owners who complied with the law, which was later found to be invalid, were the only property owners who had to pay.

Finally, I point out that Judge Davis, in her concurring opinion in the First District's Newsweek decision, cited Dryden v. Madison County, 672 So.2d 840, 843 (Fla. 1st DCA 1996), as a basis for the First District's refusal to provide a refund to Newsweek. Newsweek, Inc. v. Department of Revenue, 689 So.2d 361, 364 (Fla. 1st DCA 1997) (Davis, J., concurring). Judge Davis pointed to the First District's reasoning in Dryden that Gulesian equitable considerations were a basis for denying refunds to Dryden and suggested that this same reasoning should support the denial of refunds in Newsweek. Id. Not only did the United States Supreme Court refuse to accept the Dryden analogy as a reason for denying "meaningful post-payment relief" in Newsweek, but the Court also vacated our judgment in Dryden on the basis of its reversal of the First District's Newsweek decision.

PARIENTE, J., and OVERTON, Senior Justice, concur.